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The purpose of the case summaries is to provide a general factual and legal overview of the case and a brief summary of the ruling of the Constitutional Court. As such, the case summaries do not replace the decisions of the Constitutional Court nor do they represent the actual language of the ruling of the Constitutional Court decisions.

BULLETIN OF CASE LAW

2009-2010

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Foreword

It is the mark of a democratic country committed to the Rule of Law that justice is administered in public and that its Courts will fearlessly and openly pronounce its Decisions and Judgments and to make them available to the public. This serves not only to inform the parties in each case of the result of a case but also to let the public know how a court reached a decision. Thereby the reasoning and the principles underpinning its rulings may become widely known. The benefits of this include the principle of legal certainty that is essential for the conduct of public and private business. This in turn enhances confidence in the administration of justice.

The Constitutional Court of Kosovo, as soon as may be after decisions are made, serves its Decisions on the parties and it publishes them in the Official Gazette and also on the Court's own web page. Now, in addition, the Court proudly presents its first Bulletin of Case Law. This Bulletin contains all the cases in which the Court has issued Decisions from its inauguration up to the end of 2010. I draw the attention of readers to the case summaries that we have included before each Decision. The case summary will give a general overview of the facts, the law and the ruling of the case without having to read the entire Decision.

The Bulletin is arranged so that key words can be consulted in the index for ease of searching the entire body of Decisions and also an index of Articles of the Constitution that has been included at the end with the aim of making this publication user-friendly and easier to search.

The Court hopes that this and future publications of the Bulletin of Case Law will assist Judges, law makers, legal practitioners, academics, students and the public in studying the developing jurisprudence of the Constitutional Court.

Prof. Dr. Enver Hasani
President of the Constitutional Court

Tomë Krasniqi vs. Radio Television of Kosovo and Kosovo Energy Corporation

Case KI 11/09, decision of 16 October 2009
Keywords: individual referral, interim measure, violation of public interest, legal effect of decisions

The applicant filed a referral whereby he requests the imposition of the interim measure for suspending the collection of 3.5 Euros as a fee for payment for Radio television of Kosovo (RTK), through electric energy bills. He contends that this method of collection is a result of an illegal contract, which violates the public interest. He also contends that the amount paid is too high and that such a collection discriminates many citizens since it is calculated per every electric meter, rather than every family as requested by the Law on Radio Television of Kosovo.

While recalling the importance of financing of the public broadcaster, but not agreeing with this method of collection, the Constitutional Court decided to allow granting the interim measures against further implementation of Article 20.1 of the Law on Radio Television of Kosovo, with the reasoning that the public interest of citizens was violated, same as the personal interest of the applicant[1]. Furthermore, the Court recommended to the Assembly of the Republic of Kosovo to review the nature of Article in question until a decision on merits of the case is taken.

Pristina, 16 October 2009
Ref. No.: MP 01/09

DECISION

Interim Measures/ IM/ : Case KI 11/09,
Tomë Krasniqi vs **RTK et Al**

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Kadri Kryeziu, Judge
Gjyljeta Mushkolaj, Judge
Iliriana Islami, Judge
Ivan Čukalovič, Judge
Altay Suroy, Judge
Snezhana Botusharova, Judge and
Almiro Rodrigues, Judge

[1] This interim measure has been extended until January 1, 2011 with the Order of the Court No.33/10 of June 14, 2010.

With Mrs. Njomza Uka, Official for Registration of cases, as a minute taker of the meeting held for deliberation and voting on 13 October 2009 regarding the Referral Kl. 11/09 initiated by

The Applicant:

1. Mr. Tomë Krasniqi, represented by himself

The Opposing Parties:

2. Radio and Television of Kosovo (hereinafter referred to as: RTK) and the Kosovo Energy Corporation (hereinafter referred to as: KEK), represented by authorized representatives Mrs. Merita Lumnezi and Bilall Fetahu respectively.

Subject Matter:

3. request of 2 September 2009 on imposing the interim measures for the referral KI. 11/09, filed by Mr. Tomë Krasniqi against RTK et Al.

Legal Basis:

4. Art. 116 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Art. 27 of the Law No. 03/L-121 on the Constitutional Court of Kosovo of 16 December 2009 (hereinafter referred to as: the Law), Art 52 in connection with Art 59 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

The Applicant,

5. filed with the Court on 2 September 2009 a request asking the Court to impose an interim measure for the referral KI 11/09, which has to deal with the payment of 3.5 on behalf of RTK in the name of a prepaid service. This amount of 3.5 euro is extracted from him and all consumers of the electricity energy in Kosovo since 2003.

6. The applicant sees the violation of public interest as foreseen in Art. 27 para 1 of the Law and the same Article is put forward as a legal basis for the imposition of the interim measure as requested.

7. Main arguments presented during the hearing of 6 October 2009, which the Court organized for that matter, consist in the illegality of the Contract between RTK and KEK No. 2531 of 19 December 2008, serving as a legal basis for collecting the 3.5 euro from the Kosovo consumers of

the electric energy. This method of extracting 3.5 euros violates public interest and the legal provisions regulating it, having in mind first and foremost the Art. 2.1 of the Administrative Direction No. 2003/12 on the Implementation of the UNMIK Regulation No. 2001/13 on Radio and Television of Kosovo.

8. Legal and factual basis which is contested by the applicant, as started by him, is superseded in the meantime by the promulgation of the Law No. 02/L-47 on the Radio and Television of Kosovo of January 20, 2006 (hereinafter referred to as: the Law on RTK), while the old practices still continue to be applied by the opposing parties of this case. The applicant has as well stated that 3.5 euro represent 10 per cent of his 40 euro income per month (as a pensioner of Kosovo). This fact further means that the payment of 3.5 euro is causing him an irreparable damage and suffering since it does not protect him and other consumers of the Kosovo electricity, energy in the way it is supposed to according to Art. 20 of the Law on RTK and as such it is discriminatory because it uses the counters of the electricity as a reference point and not the households.

The Opposing Parties:

9. Opposing parties, RTK and KEK respectively, presented their claims and arguments regarding the request of the applicant for the imposition of an interim measure for the Referral KI. 11/09 filed by. Mr. Tomë Krasniqi, and stated that

Radio and Television of Kosovo (RTK)

10. RTK said that the Law on RTK, approved by the Assembly of Kosovo in 2006, is constitutional and defines the RTK as a public institution having national and cultural importance. As such, RTK offers public services in the field of both radio and television. It is for these reasons that the RTK should be still financed by the public in the way it is being now financed.

Kosovo Energy Corporation (KEK)

11. KEK in an obvious and open manner stated that it has been suffering material loss and damage as a result of its collection of 3.5 euro from Kosovo consumers of the electric energy. This 3.5 euro is paid by them alongside with the electricity bills of the consumers of the Kosovo electric energy. The losses suffered and the damages caused to KEK are around 400 million euro so far. As such they are reimbursed to KEK by other financial resources. For these reasons KEK made it clear that it is so more willing to extend the application of the Contract No. 2531 of 19 December 2008, concluded between RTK and the KEK. This contract

serves as a basis for collecting this amount of 3.5 euro by Kosovo consumers of the electric energy since 2003 on behalf of the RTK. KEK representatives reminded the Court that the mentioned Contract expires on 30 November 2009. The very reason for this, according to KEK, is that it is unjustly damaged and suffers serious problems and difficulties while collecting its own revenues as a result of its bills having to collect the 3.5 euro on behalf of the RTK. The merger of two bills in one is seen by KEK as the main obstacle for if not being an effective and efficient provider of public good, e.g. the electricity energy, to Kosovo customers.

CONSTITUTIONAL COURT

12. After having heard the judge rapporteur, Mrs. Iliriana Islami, the views of the parties as expressed in the hearing on the request for an interim measure held on 6 October 2009, discussed the matter in its entirety in the deliberations held in 12 and 13 of October 2009, and therefore

NOTES

13. The Court considers that this individual application does not concern only the personal interest of the applicant, but also the public interest and that for this reason it deems opportune to grant the requested interim measure, consisting of the suspension of further application of the provision of Art. 20.1 of the Law on RTK, which provisions serve at this moment as the legal basis for the collection of 3.5 euro from the Kosovo consumers of the electric energy. The amount of the fee of 3.5 euro envisaged in the same provision of Art. 20.1 of the Law on RTK is as well part of the public concern.

14. The measure granted by this Court shall remain in force until the Court decided the merits of the referral KI. 11/09, initiated by Mr. Tomë Krasniqi.

15. The Court recognizes the importance of the public broadcasting and its role in a democratic society. However, the Court considers that the methodology used for financing public broadcasting in Kosovo should be alongside the best practice of Europe and its legal standards.

16. The application of Mr. Tomë Krasniqi instituting proceeding before this Court, filed with it on March 16, 2009, KI. 11/09, deals with the national laws and administrative practices based on them. In his application, Mr. Tomë Krasniqi requests *in abstracto* control of the constitutionality of some provisions regulating the work of the RTK.

17. However, the Court notes that the request for an interim measure by Mr. Tomë Krasniqi is not an *actio popularis,* as it might look at first instance. It is so that due to the fact that there is an abundant case law of the

European Court on Human Rights, which based on Art. 53 of the Constitution of the Republic of Kosovo should serve as our very basis while interpreting all our decisions. In line with this, the case law of the European Court of Human Rights says that the party may ask for such a measure and be granted as such if "... the party bring *prima facie* evidence of such a practice and of his being a victim of it" (Cf. Biriuk v. Lithuania, No. 23373/0325, §27, 25 February 2009, *mutatis mutandis,* Cf. Dudgeon v. the United Kingdom, 22 October 1981, §§ 40-41, Series A No. 45). For these reason, the procedure instituted by the applicant as an individual in its nature as said in Art 113 Para 7 of the Constitution and Art. 47 of the Law take an objective character afterwards. The Court considers therefore that here we are not dealing with an *action popularis*, although we have to do not only with an individual interest but as well as will a public one. All the more, the Court considers that the case "involves consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely" (Cf. James and Others v. the United Kingdom, Series A No. 98, par, 46, 22 February 1986).

FOR THESE REASONS

This Court, after thorough examination of all papers and arguments of the referral, based on Art. 116 of the Constitution and Art. 27 of the Law, as well as Art. 52 in connection with Art. 59 of the Rule of Procedure, by majority vote

DECIDED

I. It is GRANTED an interim measure on further application of the provisions of Art. 20.1 of the Law on RTK, pending the decision on merits of the Referral KI. 11/09

II. It is RECOMMENDED to the Assembly of the Republic of Kosovo that it reviews until December 2009 the nature of Art. 20.1 of the Law on RTK and practices based on those provisions

III. Following December 1, 2009 and thereafter, the Court decides the merits of the Referral

IV. This decision is to be notified to the applicant, the opposing parties, the Assembly of the Republic of Kosovo, and shall be duly published

V. This Decision is in power from this moment on

Judge Rapporteur	**President of the Court**
Dr. Iliriana Islami, signed	Prof. Dr. Enver Hasani, signed

Haxhi Thaçi vs. Kosovo Judicial Council

Case KI 09/09, decision of 19 November 2009
Keywords: individual referral, *locus standi-*, abstract control of constitutionality, interim measures, judicial fees.

The applicant filed a referral to assess the constitutionality of legal grounds for issuing the Administrative Instruction of the Kosovo Judicial Council (KJC) on unification of judicial fees. The applicant claimed that the KJC had no mandate to impose judicial fees by such a bylaw, due to the fact that Article 119.8 of the Constitution provides that "[...] each person must pay fees and other contributions as provided by law". At the same time, the applicant requested granting of interim measures, thereby suspending further implementation of such secondary legislation until the case was decided on the merits.

The Court decided that the applicant had not been able to prove that issuance of such acts resulted in a violation of his individual rights, and that in this manner he had requested an abstract review of constitutionality. Since the Article 113 of the Constitution does not allow individuals to file such a referral, the Court found that the applicant lacks *locus standi-*. Further, the Court decided that the applicant had also failed to prove exhaustion of all remedies available by law, before filing such referral before this Court. For these reasons, the Court decided to reject the referral as inadmissible.

Pristina, 19 November 2009
Ref. No.: RK 02/09

RESOLUTION

Inadmissibility of the Application/IA/ as to the Referral KI. 09/09 "Haxhi Thaqi versus Kosovo Judicial Council"

Constitutional Court of the Republic of Kosovo acting through the Review Panel consisting of

Judge Snezhana Botusharova, Chair
Judge Ivan Čukalovič, Member
Judge Altay Suroy, Member

with the minute-taker Mr. Naser Hasani, Director of the Department for the Registration of Cases, Statistics and Archive, and Judge Kadri Kryeziu, as Judge Rapporteur, in a deliberation held on 27 October 2009, took into

consideration Referral No. 09/09 “Haxhi Thaqi versus Kosovo Judicial Council, filed on 5 March 2009, with the following details:

Petitioner:

1. Haxhi Thaqi from the village of Damjan, Gjakova, Kosovo, acting on his own behalf.

Respondent:

2. Kosovo Judicial Council, Pristina, Kosovo, represented by Mr. Isa Hasani, Acting Head of the Legal Office, Kosovo Judicial Council.

Subject:

3. Assessment of the constitutionality of the legal basis upon which Administrative Instruction No. 2008/2 of the Kosovo Judicial Council, dated 27 November 2009, has been enacted.

Legal Basis:

4. Article 113.7 of the Constitution of the Republic of Kosovo; Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo; and

5. On 5 March 2009, the Petitioner submitted a referral seeking the assessment of constitutionality of the legal basis upon which Administrative Instruction No. 2008/2 of the Kosovo Judicial Council (hereinafter referred to as the “Council”) on “On the Unification of Court Fees”, dated 27 November 2009, has been enacted.

6. The sought relief was the repeal of the aforesaid Administrative Instruction.

7. The Petitioner also requested the imposition a Provisional Measures suspending the application of the Administrative Instruction No. 2008/2 and the Information Circular No. 09/031-15558, issued by the Director of the Secretariat of the Council, until the present referral is decided on its merits.

8. On 11 August 2009, the Provisional Secretariat of the Constitutional Court (hereinafter referred to as the “Court”) processed the case by informing the Respondent about the referral and inviting it to reply pursuant to Article 22.2 of the Law on Constitutional Court.

9. The Respondent submitted its reply, No. Ref/09/031-934 on 14 August 2009.

10. On 28 August 2009 the President of the Court through Decision No. GJRap. 02/09, appointed the Judge Rapporteur and the Review Panel for this referral in accordance with the Court's Random Case Assignment System.

11. On 9 September 2009, Judge Rapporteur delivered the report to the Review Panel, which deliberated the referral in private on 25 September 2009.

12. The Petitioner claims that the enactment of Administrative Instruction No.2008/2 "On the Unification of Court Fees" by the Council is in contradiction with Article 119.8 of the Constitution of Kosovo (hereinafter referred to as the "Constitution"), which provides that "[e]very person is required to pay taxes and other contributions provided by law."

13. The Petitioner argues that taxes can only be introduced by law, passed by the Assembly of Kosovo. Consequently, the Petitioner maintains that the Council lacks the mandate to enact legal instruments introducing taxes. Furthermore, according to the Petitioner, the Assembly of Kosovo, as the highest law-making institution in Kosovo, retains the exclusive authority for passing laws that include a provision on the introduction and collection of taxes.

14. The Petitioner has not presented any claims on the violations of his human rights and freedoms as a result of the enactment or application of the aforementioned Administrative Instruction nor has he provided any other evidence supporting his legal standing to file a referral of such nature.

15. Furthermore, the Petitioner has not specified the legal grounds on the basis of which he seeks the imposition of the Provisional Measures, as required by Article 27 of the Law on Constitutional Court and Article 51.2 of the Rules of Procedure.

16. In its reply, the Respondent stated that Administrative Instruction No. 2008/2 is in compliance with the Constitution as it is enacted on the basis of Administrative Directive 2008/4 of United Nations Interim Administration in Kosovo (hereinafter referred to as "UNMIK"), dated 30 April 2008 implementing UNMIK Regulation 2005/52 "On the Establishment of the Kosovo Judicial Council", dated 20 December 2005. The Respondent claims that the Council is full authorizes by the

aforementioned UNMIK legal instruments to "develop a uniform schedule of court fees and other judicial procedural expenditures levied by the courts in Kosovo."

17. Consequently, according to the Respondent, Administrative Instruction No. 2008/2 is enacted by the competent authority and pursuant to applicable law.

CONSTITUTIONAL COURT

18. in accordance with Article 22, paragraphs 3 and 6 of the Law on Constitutional Court and Articles 34 and 35 of the Rules of Procedure issued Decision No. GJRap. 02/09, dated 28 August 2009, appointing Judge Kadri Kryeziu as Judge Rapporteur and Decision No. KShqyr. 01/09, dated 28 August 2009, appointing the Review Panel consisting of Judge Snezhana Botusharova, Chair, Judge Ivan Čukalovič, Member and Judge Altay Suroy, Member.

19. After having heard the Report of the Judge Rapporteur and having deliberating on it in private on 25 September 2009, the Constitutional Court

CONSIDERS

20. that there are two primary issues that needed to be addressed in order to make a determination as to the admissibility of Petitioner's referral. Namely, the Court must determine whether the Petitioner has *locus standi* to file the referral of his nature and whether the referral has been filed after the exhaustion of regular legal remedies by the Petitioner.

21. With respect to the Petitioner's *locus standi* to file a case of this nature, the Court notes that although the Petitioner has invoke Article 113.7 of the Constitution as the legal basis for filing the present referral to the Court, the Petitioner has failed to present any evidence demonstrating that the enactment or the application of the contested legal instrument has resulted in the violation of his human rights and freedoms.

22. According to Article 113.7 of the Constitution, the right of individuals to initiate a claim in the Constitution Court is contingent upon the demonstration of the violation of human rights and freedoms by the acts of public authorities. This perquisite is in accordance with the requirement of Article 34 of the European Convention of Human Rights, which states that

23. [t]he Court may receive applications from any person, non-governmental organization or group of individuals *claiming* to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this rigat [Emphasis added].

24. In absence of this element, the review of the constitutionality of the acts of public authorizes falls into the realm of the so-called abstract control of constitutionality, a right, which according to the Constitution of Kosovo, is limited to only those entitles and groups explicitly enumerated under Article 113, paragraphs 2, 3, 4, 5, 6, 8 and 9.

25. In light of this, the Court considers that the present referral should be declared as *inadmissible* as the Petitioner lacks legal standing to initiate a matter of this nature before the Court.

26. Notwithstanding the fact that the Court considers that the referral should be declared inadmissible due to the fact that the Petitioner lacks *locus standi* as far as the abstract control of constitutionality is concerned, the examinations of the exhaustion of regular legal remedies element is important as it corroborates the Court's conclusion that the Petitioner is seeking an abstract control of constitutionality of Administrative Instruction No. 2008/2, a constitutional remedy that is not legally available to him.

27. Unlike cases that include violation of individual's human rights and freedoms cases of abstract control of constitutionality do not require the element of exhaustion of regular legal remedies. Instead, as provided for under Article 113, paragraphs 2, 3, 4, 5, 6, 8 and 9 of the Constitution, the entities that are authorized to seek abstract control of constitutionality can do so directly. Indeed, in these cases the Court serves as the exclusive and final forum for the adjudication of disputes of this nature. This is not only due to the fact that the Constitution expressly limits the entities that can file referrals for abstract control of constitutionality but also because issues that can be subject to abstract control of constitutionality are limited to the matters of an immense social importance.

FOR THESE REASONS

The Court pursuant to Article 113.7 of the Constitution, Article 22, paragraphs 7 and 8 and Article 47 of the Law on Court, as well as Articles 34 and 35 of the Rules of Procedure unanimously.

DECIDED

I. TO DECLARE AS INADMISSIBLE the application for the review of constitutionality of

II. the Administrative Instruction No. 2008/2 on the Unification of Court Taxes, enacted by the KJGJ on 27 November 2008.

III. This draft-resolution is to be delivered to the parties, Mr. Haxhi Thaqi and the KJC respectively and to the Assembly of the Republic of Kosovo and shall be duly published.

IV. This draft-resolution enters into force immediately.

Judge Rapporteur	**President**
Kadri Kryeziu, signed	Prof. Dr. Enver Hasani, signed

Dedë Gecaj vs. Decision PKL-KZZ 76/08 of the Supreme Court

Case KI 22/09, decision of 15 December 2009
Keywords: Individual referral, interim measures, extradition.

The applicant filed a referral claiming that his constitutional rights were infringed by a decision of the Supreme Court of Kosovo, which found the agreement on extradition of applicant to Swiss authorities to be valid. The applicant claimed that the judgment of the Supreme Court violated the principle *ne bis in idem*, claiming that his eventual extradition violates "international law" and "international human rights standards", and that in case of extradition he may be subjected, inter alia, to inhuman treatment. On these grounds, the applicant requested interim measures suspending such extradition.

The Court rejected applicant's request for interim measures, reasoning that he had not submitted any proof to justify suspension of his extradition, such as proof that his extradition to Switzerland would subject him to inhuman treatment, and that he would suffer irrecoverable damage in case of extradition.

Pristina, 15 December 2009
Ref. No.: MP 03/09

DECISION

on the request for the internim measures
in
CASE No. KI. 22/09
Dede Gecaj against Decision PKL-KKZ 76/08 of the Supreme Court

THE CONSTITUCIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Snezhana Botusharova, Judge
Robert Carolan, Judge
Ivan Čukalovič, Judge
Iliriana Islami, Judge
Gjylieta Mushkolaj, Judge
Altay Suroy, Judge

With Ms. Albana Sopi, as minute taker, at the Court`s deleberationes and votin on 25 November 2009 on the Applicant`s request for internim measures in Case No. KI 22/09, filed on 22 June with this Court.

The Applicant

1. The Applicant, Mr. Dede Gecaj, is represented by Dr. Kole Krasniqi, a practising lawyer in Peja.

Subjetct Matter

2. The applicant complains that this rights under the Constitucional have been violated by Decision PKL-KZZ 76/08 of the Supreme Court of 6 April 2009, by which the Agreement of the 20 august 2007, concluded between UNMIK and the Swiss authorities regarding the Applicant`s extradition to Switzerland, was declared valid. He alleged that the exredition would violate "international law" and "international standarts of human rights".

3. In his submissions of 17 September 2009, the Applicant`s representative requested of Constitutional Court to suspend the procedure on the Applicant's extraditio.

Legal Basis

4. Art. 116 of the Constitutional of the Republic of the Kosovo (hereinafter referred to as: the Constitutional), Art. 27 of the Law No. 03/L-121 on the Constitutional Court of Kosovo of 16 December 2009 (hereinafter referred to as: the Law), and Art 52 (1) of the Rules of Procedure of the Constitutional Court of the Republic of the Kosovo (hereinafter referred to as: the Rules of Procedure).

The facts

5. In January 1999, the Applicant, who was living in Switzerland, apparently killed the teacher of his daughter and fled the country. On 25 February 1999, he was arrested in Gjakova, Kosovo and charged pursuant to the Law on Criminal Proceedings of the Socialist Federal Republic of Yugoslavia of 1977. After he had appeared before the District Court of Peje on 1 march 1999, the Supreme Court of the Republic of Serbia changed the venue of the case from the case District Court of Peje to the District Court in Leskovac, which sentenced him to four years imprisonment for murder.

6. Pending his appeal before the Supreme Court of Serbia, the Applicant was released. On 28 March 2002 and 38 march 2003 the Supreme Court

confirmed his conviction, but reduced the pernallty to three years and 6 months imprisonment. The Applicant has, so far, not served the remanibder of his sentence.

7. On 19 May 2003 and again on 6 December 2005, the Swiss authorities issued a warrant for the Applicant`s arrest for the acts committed in Switzerland. On 22 February 2006, an Agreement was concluded between the Swiss authorities and UNMIK regardin the Applicant`s exradition. He was arrested in Kosovo on 4 May 2006 and released the same day.

8. On 17 August 2007 his detention was ordered for diferent charges and a new Agreement between the Swiss authorities and UNMIK was concluded on 20 August 2007. The court proceeding, which the Applicant initiated to have the Agreement declared invalid, culminated in the Kosovo Supreme Court deciding on 6 April 2009 that the Agreement was valid and that the principle “ne bis in idem”, as invoked by the Applicant, was not applicable.

The Applicant`s allegationes

9. The applicant complained that Decision No. PKL-KZZ 76/08 of the Supreme Court of Kosovo of 6 april 2009 infringed the principle “ne bis in idem”, since the case had already been adjudicated by a final judgment of the Supreme Court of Serbia. Furthermore, he alleged that the above Decision violated Article 517.9 of the Provisional Criminal Code of the Kosovo, with requires that the transfer of a person to a foreign jurisdiction can only be allowed, if there is no real risk that the person concerned will face inhuman or degrading treatment or punishment.

10. In the Applicant’s opinion, the Swiss authorities have proven to be acting unlawfully, and in a discriminatory and revengeful manner because of his national background and their hate against foreigners.

11. The applicant has not invoked any particular Article of the Constitution.

THE CONSTITUTIONAL COURT

After having heard the Judge Rapporteur, Gjylieta Mushkolaj, and discussed the Applicant’s submissions regarding his request for interim measures, deliberated on 25 November 2009 and concluded, without prejudging the final outcome of the Referral, that the request should be rejected. The Court found that the Applicant has not submitted any evidence which would justify the suspension of the extradition proceedings pending the final outcome of his Referral. In particular, the Applicant’s complaint that his extradition to

Switzerland would submit him to inhuman or degrading treatment, contrary to Article 3 of the European Convention on Human Rights, has not been substantiated. The Applicant has, therefore, not shown that he would suffer irreparable damage, if the Court would reject his request for interim measures.

FOR THESE REASONS

The Court, pursuant to Art. 116(2) of the Constitution, Article 27(1) of the Law, and Art. 52(1) of the Rules of Procedure, by majority,

DECIDES

I. TO REJECT the Request for interim measures;

II. This Decision is to be notified to the Parties.

III. This Decision shall be published in accordance with Art. 20(4) of thee Law and is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr. Gjylieta Mushkolaj, signed	Prof. Dr. Enver Hasani, signed

Fadil Hoxha vs. Municipal Assembly of Prizren

Case KI 56/09, decision of 15 December 2009
Keywords: individual/group referral, assessing the constitutionality of Municipal Assembly Decision related to urban planning, possibility of influencing decisions related to living environment, interim measure.

Applicants filed a referral before the Constitutional Court, requesting it to assess the constitutionality of an amendment of the decision of the Municipal Assembly of Prizren, which decided to build several multi-storey buildings instead of green areas in their neighbourhood. Applicants challenged the above-mentioned decision claiming that such a decision violated their rights to influence decisions related to their living environment, as provided under Article 52.2 of the Constitution. Applicants claimed that the Municipality had failed to inform them properly and to take into account continuous remarks of citizens related to this decision. Simultaneously, applicants requested the Court to grant interim measures in order to stop any action or work of the Municipality in constructing multi-storey buildings, with a view to avoiding any irrecoverable damage.

The Court decided to allow interim measures, and suspended the execution of the challenged decision, after finding that the applicants had offered convincing arguments that request for interim measures was reasonable and justified, and that the implementation of the challenged decision may cause irrecoverable damage for applicants[1].

Pristina, 15 December 2009
Ref. No.: MP 06/09

DECISION

on the request for interim measures in
Case No. KI 56/09,
Fadil Hoxha and 59 Others
vs.
Municipal Assembly of Prizren

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Snezhana Botusharova, Judge

[1] The Constitutional Court decided to extend interim measure, as requested by applicant by decision VM 09/10 of 24 March 2010, decision VMP 17/10 of 30 april 2010 and Decision VMP 32/10 of 16 June 2010.

Robert Carolan, Judge
Ivan Čukalovič, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjyljeta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

With Albana Sopi, as minute taker, at the Court's deliberations and voting on the Applicant's request for interim measures, which took place on 25 November 2009, in Case No. KI. 56/09, initiated by:

The Applicants

The Applicants are Mr. Fadil Hoxha and 59 others from the Municipality of Prizren.

The Opposing Party

The Opposing Party is the Municipal Assembly of Prizren.

Subject Matter

1. The Applicants' request of 17 October 2009 to impose interim measures in case KI.69/09, filed by Fadil Hoxha and 59 "family heads of the neighborhood Dardania",

Legal Basis

2. Art. 116 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Art. 27 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2009 (hereinafter referred to as: the Law), and Art 52 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

The facts

3. By Decision No. 01/011-3257 of 30 April 2009 issued by the Municipal Assembly of Prizren, an earlier Decision for a Detailed Urban Plan (DUP) for the neighborhood Jaglenica (now Dardania) was amended (hereinafter referred to as: Decision of 30 April 2009). These amendments, in their relevant part, are specified in Art. 2 of the Decision of 30 April 2009, and read as follows: "In the graphical part of the technical plan in the cadastral plots..., instead of an existing green

environment foreseen in the Detailed Urban Planning, it has now been planned to construct high tower blocks, planned for families of martyrs and social cases…”.

4. On 13 July 2009, the Applicants submitted a Petition to the Municipal Assembly of Prizren asking the annulment of the Decision of 30 April 2009. In that Petition the Applicants, in particular, argued that the contested Decision had been adopted contrary to the relevant Articles of the Law on Spatial Planning (No. 2003/14) and the Law on Local Self-Government (No. 03/L-040).

5. On 11 September 2009, the Applicants submitted the Referral to the Constitutional Court, requesting the Court to evaluate the constitutionality and legality of the Decision of 30 April 2009.

6. On 17 October 2009, the Applicants supplemented the Referral with further arguments requesting the Court to issues Interim Measures ordering the Opposing Party to suspend immediately any action or work in the plot of land concerned in order to avoid any irreparable damages.

The Applicants’ complaints

7. The Applicants complained that their rights guaranteed by Art. 52(2) of the Constitution had been violated, which provides that: “Everyone should be provided an opportunity to be heard by public institutions and have their opinions considered on issues that impact the environment in which they live.”

8. The Applicants further complained that there is an immediate risk that the work in the plot of land concerned will cause irreparable damages to them and therefore requested the Court to issue the interim measures with immediate effect.

The Opposing Party’s comments

9. The Municipal Assembly of Prizren, in its written submissions of 11 November 2009, contested the Applicants’ claims as submitted in the Referral. In particular, the Opposing party argued that the Decision of 30 April 2009 was adopted in accordance with the Law on Spatial Planning and that the plot of land at issue is classified as public property, which entitles the Municipality Assembly Prizren to a well balanced and gradual development of the spatial planning of that plot.

THE CONSTITUTIONAL COURT

10. After having heard the Judge Rapporteur, Mr. Altay Suroy, and having discussed the views of the Parties as expressed in their written submissions, the Court deliberated on 25 November 2009. The Court concluded, without prejudging the final outcome of the Referral, that the Applicants have put forward enough convincing arguments proving that the request for interim measures is reasonable and justified, since the implementation of the contested Decision of 30 April 2009 may result in unrecoverable damages for the Applicants.

11. Consequently, the Court found the Applicants' request for interim measures of 17 October 2009 is reasonable and justified.

FOR THESE REASONS

The Court, pursuant to Article 116 (2) of the Constitution, Article 27(1) of the Law, and Art. 52(1) of the Rules of Procedure, by majority vote,

DECIDES

I. TO GRANT the request for interim measures for a duration of no longer than 3 months from the date of the adoption of this Decision;

II. TO IMMEDIATELY SUSPEND the execution of the "Decision for Amendment and Supplementation of the Decision of Detailed Urban Plan (UDP) of the Jaglenica Area in Prizren", adopted by the Municipal Assembly of Prizren on 30 April 2009 under No. 01/011-3257, for the same duration;

III. TO ORDER the Municipal Assembly of Prizren to suspend any construction at the above location for the same duration;

IV. This Decision shall be notified to the Parties;

V. This Decision shall be published in accordance with Article 20 (4) of the Law and is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy, signed	Prof. Dr. Enver Hasani, signed

Rafet Hoxha vs. Decision Pn. No. 168/05 of the Supreme Court

Case KI 27/09, decision of 15 December 2009
Keywords: individual referral, interim measures, extradition.

The applicant filed a referral claiming that his constitutional rights were violated by a decision of the Supreme Court of Kosovo, which found an agreement on extradition of the applicant to Norwegian authorities to be valid. The applicant claimed that his rights guaranteed by Articles 35 (4) and 17, 18 and 22 of the Constitution were violated. On these grounds, the applicant requested the Court to grant interim measures to suspend his extradition.

The Court rejected the request of the applicant for interim measure, reasoning that he had not submitted any evidence to justify the suspension of extradition, such as evidence that such extradition to Norway would subject him to inhuman treatment, where he would suffer irrecoverable damages in case of extradition.

Pristina, 15 December 2009
Ref. No.: MP 04/09

DECISION

on the request for interim measures
in
Case No. KI. 27/09
Rafet Hoxha
vs.
Decision No. Pn. Nr. 168/2005 of the Supreme Court

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Snezhana Botusharova, Judge
Robert Carolan, Judge
Ivan Čukalović, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjylieta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

With Albana Sopi, as minute taker, at the Court's deliberations and voting on the Applicant's request for interim measures, which took place on 25 November 2009, in Case No. KI 27/09, initiated by:

The Applicant

1. The Applicant is Rafet Hoxha, represented by Hamdi Podvorica, a practising lawyer in Pristina.

Subject Matter

2. The Applicant filled the Referral to the Court on 13 July 2009. In his Referral the Applicant complains that his rights under the Constitution had been violated by Decision No. Pn.nr. 168/2005 of the Supreme Court of 7 July 2005 (hereinafter referred to us: the Supreme Court Decision).

3. On 13 October 2009, the Applicant supplemented the Referral with a request for interim measures, specifically, requesting the suspension of the procedure for his transfer to Norway, until the Constitutional Court would issue its final Decision.

Legal Basis

4. Art. 116 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Art. 27 of Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law), and Art. 52(1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

The facts

5. The Supreme Court Decision confirmed Decision Kp.nr. 120/2005 of the District Court of Pristina which stipulated that all legal preconditions for the extradition of the Applicant to Norway, laid down in the Agreement of 22 October 2004 concluded between UNMIK and the Government of the Royal Kingdom of Norway, had been fulfilled.

6. The aforementioned Agreement concluded between UNMIK and the Royal Kingdom of Norway, stipulates surrender of the Applicant to the Kingdom of Norway, since the Norwegian authorities have initiated criminal proceedings against the Applicant for the criminal offence of murder as allegedly occurred on 31 March 2003.

7. On 13 July 2009 the Applicant submitted the Referral to the Constitutional Court, requesting the Court to evaluate the constitutionality and legality of the Supreme Court Decision.

8. On 13 October 2009, the Applicant supplemented the Referral with further arguments in his favour, requesting the Court to issue interim measure and suspend his extradition to Norway. In particular the Applicant argued that his previous lawyer who represented him before the Supreme Court made a mistake because he did not submit the evidence that the Applicant is a citizen of Kosovo.

The Applicant's complaints

9. The Applicant complained that his right guaranteed by Article 35 (4) as well as Articles 17, 18 and 22 of the Constitution have been violated. It should be recalled, in particular that Article 35 (4) of the Constitution prescribes that "Citizens of the Republic of Kosovo shall not be extradited from Kosovo against their will except for cases when otherwise required by international law and agreements."

10. According to the Applicant, the alleged violation of his constitutional rights constitutes sufficient ground for the Court to grant the requested interim measure.

THE CONSTITUTIONAL COURT

After having heard the Judge Rapporteur, Ivan Čukalović, and having discussed the Applicant's submissions regarding his request for interim measures, deliberated on 25 November 2009. The Court concluded, without prejudging the final outcome of the Referral, that the request for interim measure was unsubstantiated. The Applicant has not submitted any evidence that his extradition may result in unrecoverable damage for him, and in particular that, upon his extradition to Norway, he would face inhuman or degrading treatment in that country, contrary to Article 3 of the European Convention on Human Rights.

FOR THESE REASONS

This Court, pursuant to Art. 116(2) of the Constitution, Article 27(1) of the Law, and Art. 52(1) of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT the request for interim measures;

II. This Decision shall be notified to the Parties;

III. This Decision shall be published, in accordance with Art. 20(4) of the Law, and is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Prof. Dr. Ivan Čukalović, signed	Prof. Dr. Enver Hasani, signed

AAB-Riinvest University vs. the decision No. 01/73 of the Government of Republic of Kosovo

Case KI 41/09, decision of 21 January 2010
Keywords: referral filed by a legal person, interim measure, assessment of constitutionality.

The applicant filed a referral requesting from the Court to assess the legality and constitutionality of decision no. 01/73 of the Government of Kosovo, by which the applicant was given the name "College" instead of "University". Simultaneously, the applicant requested the Court to impose interim measures related to implementation of the above decision and limitation of new student enrolment for the academic year 2009/2010. The applicant claimed that if such a decision remained in force it risked causing irrecoverable damages.

The Court rejected applicant's request for interim measures, reasoning that the applicant had failed to submit any argument or evidence regarding irrecoverable damages he would suffer if the Government Decision remained in force or that granting interim measures was in the public interest.

Pristina, 21 January 2010
Ref. No.: MP 01/10

DECISION

on the request for interim measures
in
Case No. KI 41/09
AAB-RIINVEST University L.L.C., Pristina
vs.
Government of the Republic of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Snezhana Botusharova, Judge
Robert Carolan, Judge
Ivan Čukalovič, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjyljeta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

With Mrs. Njomza Uka, Officer for Case Registration, as minute taker at the Court's deliberations and voting on the Request for interim measures, which took place on 25 November 2009, regarding Case No. KI 41/09, initiate by

The Applicant

1. The Applicant is called "AAB-RIINVEST University", with its Headquarters in Pristina and represented by its Secretary, Granit Curri.

The Opposing Party

2. The Opposing Party is the Government of the Republic of Kosovo.

Subject Matter

3. The Applicant's Request of 23 September 2009 to impose interim measures regarding in Case KI. 41/09 filed by "AAB-RIINVEST University"

Legal Basis

4. Art. 116 of the Constitution of the Republic of Kosovo (hereinafter referred to as the Constitution), Art. 27 of Law No 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Law) and Art. 52(1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

The facts

5. By Decision No. 01/73 of 7 July 2009, taken pursuant to Art. 92.4 and 93.4 of the Constitutional and Art. 4.3 of the Regulation on the Functions of the Government of Kosovo No. 01/2007, and based on the recommendations of the National Quality Council of the Kosovo Accreditation Council, the Government decides, in compliance with the recommendations of the NQC of the KAA, to grant the name "College" to AAB-RIINVEST, limiting thereby the number of students to be enrolled for the academic year 2009/2010 to 500.

6. On 23 September 2009, the Applicant filed a constitutional complaint, requesting the Court to evaluate the constitutionality and legality of Decision No. 01/73 of the Government, by which the Applicant was granted the name "College".

The Applicant's complaints

7. The Applicant filed a constitutional referral on 23 September 2009, requesting the Court to evaluate the constitutionality and legality of Decision no 01/73, taken by the Government on 7 July 2009, by which the Applicant was granted the name "College" instead of "University".

8. The Applicant also requested the Court to impose a interim measure for the suspension of the execution of the Decision concerned. It considers that the requirements of Art. 27 (Interim Measures) of the Law on the Constitutional Court are met. The Applicant proposes the interim measure to be imposed with regard to the name "College" and the limitation of the number of new students to be enrolled for the 2009/2010 academic year.

9. The Applicant further argued that, if the contested Decision continued to be in force, there would be a real risk of irreversible damages, causing its activity and business, as one of the providers of higher education in the Republic of Kosovo, to be stopped or significantly hampered, since it would limit the number of new students to be enrolled for the academic year 2009/2010 to 500. It also suggested that the interim measure should last until the Court would have issued its final Decision.

The Opposing Party's response

10. The Opposing Party, to which the Referral was communicated by the Court's Registry Office on 2 October 2009, has not submitted its comments within the time limit of 45 days, as stipulated by Art. 22(2) of the Law.

THE CONSTITUTIONAL COURT

11. After having heard the Judge Rapporteur, Ms. Snezhana Botusharova, and having discussed the Applicant's submissions regarding his Request for interim measures, deliberated on 25 November 2009. The Court concluded that, without prejudging the final outcome of the Referral, the Applicant had not put forward any convincing arguments or proof that, during the adjudication of the Referral, the Court should suspend Decision No. 01/73 of the Government regarding the name "College" as well as the number of students which the Applicant would be allowed to enroll for the academic year 2009/2010.

12. The Applicant has, therefore, not substantiated the irreparable damage it allegedly would suffer or that the measure would be in the public interest, if the Court would not impose any such measure.

FOR THESE REASONS

The Court, pursuant to Art. 116(2) of the Constitution, Article. 27(1) of the Law, and Art. 52(1) of the Rules of Procedure, by majority vote.

DECIDES

I. TO REJECT the request for interim measures;

II. This Decision is to be notified to the Parties;

III. This Decision shall be published in accordance with Art. 20(4) of the Law and is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova, signed	Prof. Dr. Enver Hasani, signed

Kolë Krasniqi vs. Ministry of Agriculture and Directorate of Legal and Property Issues and Land Consolidation of the Municipality of Gjakova

Case KI 02/09, decision of 25 January 2010
Keywords: individual referral, property right, expropriation, Comprehensive Proposal for the Kosovo Status Settlement, Equality before the law

The applicant submitted a referral against the decision of the Ministry of Agriculture and Directorate of Property Issues of Gjakova Municipality whereby the applicant's referral for restitution of real estate was rejected with justification that there were no legal grounds for restitution of property since the Republic of Kosovo does not have a law that authorizes the restitution of property to former owners of state owned land properties. Applicant alleges that this Ministry has the legal authority to apply the law of former Socialist Federal Republic of Yugoslavia and that such a decision has violated his constitutional rights, not specifying exactly what constitutional provisions are violated.

The Constitutional Court decided that the applicant has not proven that he has the legal authority to make the claim for the restitution of immovable property and that he failed to accurately clarify what rights and freedoms he claims to have been violated. Further, the Court decided that the applicant has failed to exhaust all of the legal remedies before submitting the referral to this Court, referring him to legal remedies he could use pursuant to the Comprehensive Proposal for the Kosovo Status Settlement. Inadmissible

Pristina, 25 January 2010
Ref. No.: RK 02/10

DECISION

Case No. KI 02/09

The Constitutional Court of the Republic of Kosovo, acting through the Review Panel composed of

Mr. Enver Hasani, Presiding, and
Mr. Kadri Kryeziu, Judge and
Mrs. Iliriana Islami, Judge,

With the minute taker, Mr. Naser Hasani, head of the registration, statistics and archives within the Secretariat of the Court and Mr. Robert Carolan, judge rapporteur, in the meeting held 24 November 2009 took into considerations Application No. 02/09, where the

Applicant is
Mr. Kole Krasniqi
Village Meqe, Gjakova
Tel.: 044 409 903

And the OPPOSING PARTIES are
Ministry of Agriculture and Directorate of Legal and Property Issues and Land Consolidations of Gjakova Municipality.

I. Subject Matter

Decision of the Ministry of Agriculture, Forestry and Rural Development of the Republic of Kosovo, No. 2324 of 22 September 2008, Ref. S.P. 418/08, addressed to the Directorate of Legal and Property Issues of the Municipality of Gjakova relating to the restitution of real estate that was taken for the establishment of an agricultural land fund in Gjakova by decision dated 9 October 1953. This decision took from his legal predecessor land plots, part of cadastral plot No. 3/2, agricultural field of class III, in a surface of 2.50 hectares, 3/2 meadow in a surface of 0.55 hectares and plot no. 92 agricultural field in a surface of 1.2552 hectares totaling 4.52 hectares.

The Law of Expropriation of the Socialist Federal Republic of Yugoslavia (Official Gazette of SFRY No. 22/53) was applicable to an application for restitution of socially owned properties at the time that the applicant, Kole Krasniqi, commenced his application for restitution of the real estate. Pursuant to Article 1 of UNMIK Regulation No. 2000/59, amending UNMIK Regulation No. 1999/24, the applicable law in Kosovo until Kosovo became a sovereign republic was the law in force in Kosovo on 22 Mars 1989.

Applicant, Kole Krasniqi, initially directed his request for restitution on 15 January 1992 to the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality. His request was never completed. Kole Krasniqi alleges that there were various reasons why his request was never finalized: (1) some municipal leaders wanted him to pay money as a bribe; and (2) other municipal leaders prolonged and obstructed his attempts to complete the application because the applicable law at the time was Serbian law. Kole Krasniqi did not finish his application until the NATO bombing campaign began on 24 Mars 1999.

On 20 November 2008, in Decision No. 19-463-8/91-08, the Directorate denied his request for restitution of the real estate concluding that there were no legal grounds for restitution of the real estate because the Republic of Kosovo, as an independent and sovereign state, does not have any law authorizing land restitution to former owners of socially owned property.

On 9 February 2009, applicant, Kole Krasniqi, filed his appeal to the Constitutional Court of the Republic of Kosovo complaining that the Constitution was violated by the decision of the Ministry of Agriculture, Forestry and Rural Development.

II. Allegations of the Applicant

Applicant alleges that the decision of the Ministry of Agriculture, Forestry and Rural Development No. 2324 of 22 September 2008 violates the Constitution of the Republic of Kosovo because:

(1) The Ministry has the legal authority to enforce the applicable law of the former Socialist Federal Republic of Yugoslavia;

(2) Failure to enforce this law is now discriminatory against him in violation of the Constitution.

III. Response of Opposing Party or Other Interested Parties

Neither the Ministry of Agriculture nor the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality filed a formal response.

Assessment for the Admissibility of the Referral

Article 46 of the **Constitution** provides:

1. “The right to own property is guaranteed.”

2. “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 compensations to the person or persons whose property has been expropriated.”

3. “Disputes arising from an act to the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court.”

Article 143 the **Constitution** provides:
Notwithstanding any provision of this Constitution:

1. “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 dated 26 March 2007. They shall take necessary actions for their implementation."

2. "The provisions of the **Comprehensive Proposal for the Kosovo Status Settlement** dated 26 March 2007 shall take precedence over all other legal provisions in Kosovo."

3. "The Constitution, laws and other legal acts of the Republic of Kosovo shall be interpreted in compliance with the **Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007**. If there are inconsistencies between the provisions of this Constitution, laws or other legal acts of the Republic of Kosovo and the provisions of the said Settlement, the latter shall prevail."

Article 2 of Annex VII of the **Comprehensive Proposal for the Kosovo Status Settlement** dated 26 March 2007 states that the trusteeship for socially owned enterprises and their assets (SOE s) shall be exercised by the Kosovo Trust Agency (KTA) as set forth in UNMIK Regulation 2001/12 as amended.

Article 3 of Annex VII of the **Comprehensive Proposal for the Kosovo Status Settlement** dated 26 March 2007 states that the final determination of ownership and the adjudication of claims shall continue to be handled by the Special Chamber within the Supreme Court established for this purpose under UNMIK Regulation 2002/13.

Article 4 of Annex VII of the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 suggests that all immovable property claims should be adjudicated by 31 December 2008.

Article 5 of Annex VII of the **Comprehensive Proposal for the Kosovo Status Settlement** dated 26 March 2007 states that illegal possessions of private immovable property shall not confer ownership rights. It also states that if a claimant can establish that he or she had no access to the relevant institution for timely submission of a claim for adjudications within statutory time limits, such a claim shall not be considered as not receivable by a competent court or by another judicial or quasi judicial organ. This article also states that Kosovo shall implement additional measures, in consultation with the ICR, to ensure that the adjudication process on restitution or compensations of property claims is efficient and decisions are effectively enforced.

Article 6 of Annex VII of the **Comprehensive Proposal for the Kosovo Status Settlement** dated 26 March 2007 states that Kosovo shall also address property restitution issues as a matter of priority and mandates that

Kosovo establish an independent mechanism to formulate the policy, legislative and institutional framework for addressing property restitution issues.

Article 24 of the **Constitution** provides:

1. “All are equal before the law. Everyone enjoys the right to equal legal protection with discrimination.”

2. “No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.”

3. “Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.”

The Applicant, Kole Krasniqi, appears to rely upon the above- referenced provisions of the **Constitution** in support of his claim although he does not specifically state what provisions of the **Constitution** support his claim.
The government authorities appear to believe that they do not have any legal authority to act upon Applicant’s claim.

Section 7 of the Article 113 of the Constitution provides:

“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.”

Section 2 of Article 47 of The Law on the Constitutional Court of the Republic of Kosovo provides**:**

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

Article 48 of The Law on the Constitutional Court of the Republic of Kosovo 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.”

In this case it does not appear that the Applicant has exhausted all of the legal remedies provided by law. It appears that he must present his claim

first to the Special Chamber Tribunal established by the Supreme Court or another appropriately designated competent tribunal that is required to adjudicate claims for restitution of immovable property are required by The Comprehensive Proposal for the Kosovo Status Settlement.

In this case the Applicant has not proven that he has the legal authority to make a claim for restitution of the immovable property in question. He asserts that the property in dispute was expropriated from another person than him by the governmental authority in power before the Republic of Kosovo declared independence and became the sovereign power. He has not established what immovable property rights, if any, he acquired from this person. He has not established that the authority he has to assert any claim on behalf of that person who he claims had his immovable property illegally expropriated.

Therefore, at this time the Applicant's claim is not admissible. His claim may subsequently become admissible if: (1) he establishes that he has the same legal rights to this property as the person who actually had it expropriated from him by the governmental authority at the time it was expropriated; and, (2) he establishes that he has exhausted all of his legal remedies through the appropriate court in Kosovo or the appropriate special tribunal for adjudicating such claims as referenced in the Comprehensive Proposal for the Kosovo Status Settlement.

Assessment of the Substantive Legal Aspects of the Referral

If the Applicant establishes that he has a lawful claim to restitution of the property or adequate compensation for the immovable property he alleges was illegally expropriated, and if he establishes that he has exhausted all legal remedies for redress of his claim, then his claim may be admissible in the future. But this Court will not speculate upon admissibility of any future claims.

If the Applicant's claim is never heard by an appropriate legal tribunal in Kosovo, then his rights pursuant to ***Articles 46 and 143 of the Constitution*** may have been violated because he may then have been arbitrarily deprived of his property without immediate and adequate compensation, and then his right to own property may have been denied by the public authority. But this Court will not speculate upon the admissibility of any future claims in this case because the Applicant has not established that he has a lawful claim to the immovable property in dispute and has not exhausted his remedies as required by Article 113, Section 7 of the Constitution and Article 47 of the Law on The Constitutional Court.

FOR THESE REASONS IT IS RESOLVED THAT:

I. The Application for restitution of certain immovable land described in the referral is declared inadmissible.

II. The Applicant, Mr. Kole Krasniqi, the Opposing Parties, The Ministry of Agriculture and the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipally, shall be notified of this decision. For informational purposes, the Special Chamber of the Supreme Court of Kosovo shall also be notified.

III. This decision shall enter into force immediately.

Judge Rapporteur	**President of the Court**
Robert Carolan, signed	Enver Hasani, signed

Avdullah Beqiri vs. the Decision no. 50116335 of the Ministry of Labour and Social Welfare

Case KI 10/09, decision of 25 January 2010
Keywords: individual referral, judicial protection, invalidity pension.

The applicant filed a referral requesting annulment of a decision of the Ministry of Labour and Social Welfare, and against the judgment of the Supreme Court of Kosovo, which rejected applicant's right to an invalidity pension. The applicant alleged that this decision violated his constitutional rights, not specifying accurately what constitutional provisions may have been violated.

The Court found that the applicant's referral was inadmissible, and therefore should be rejected, because the applicant has not provided any evidence for such violation of constitutional rights.

Pristina, 25 january 2010
Ref. No.: Rk 03/10

DECISION

The Constitutional Court of the Republic of Kosovo, acting through the Review Panel composed of:

Mr. Almiro Rodrigues, Presiding Judge and
Mrs. Snezhana Botusharova, Judge and
Mrs. Gjylieta Mushkolaj, Judge

With the minute-take, Mr. Naser Hasani, head of registration, statistics and archives within the Secretariat of the Court and Mr. Robert Carolan, judge rapporteur, in the meeting held on 24 November 2009 took into consideration Application No. 10/09 filed with the Court on 09 March 2009, with the:

Applicant:
Avdullah Beqiri
Lagja e vreshtave
Str. E Ulqinit n.n. Pristina
Tel.: 038 254 352
044 836 541

And th Opposing Party is:
Ministry of Labour and Social Welfare

I.Subject Matter

On *26 November 2004* the Ministry of Labor and Social Welfare (MLSW) initially approved Applicant's application for disability benefits retroactive to 1 January 2004 at the rate of 40 euros per month. That decision informed the Applicant that it would be reviewed after five years. Then in a decision dated *13 December 2006* (*No. 5016335*) the Ministry of Labour and Social Welfare annulled Applicant's pension benefits because the MLSW found that Applicant's physical, sensory and mental condition did not qualify him for a disability pension. Applicant then appealed this decision. On *13 February 2007* this decision was upheld by the Appeals Council on Disability Pension within the Ministry of Labour and Social Welfare pursuant to **Article 10 of the Law Nr. 2000/23 on Disability Pensions** in Kosovo. Applicant then appealed this adverse decision to the Supreme Court of Kosovo. On *24 December 2007* the Supreme Court of Kosovo decided that Applicant's appeal and lawsuit was unfounded based upon a finding that Applicant did not fulfill the criteria of **Article 3 of UNMIK Regulation No. 2003/40** dated *27 October 2004* of the **Law on Disability Pensions** and on the opinion of the Doctor's Council of the first instance body, dated *08 November 2004* which concluded that Applicant did not have a permanent disability. In *Judgment No. 1561/2007* the Supreme Court of Kosovo specifically concluded that the administrative bodies correctly applied the provisions of **Article 3 of UNMIK Regulation No. 2003/40**.

Article 3 of UNMIK Regulation No. 2003/40 requires and applicant for disability payments to prove:

(1) whether they can or cannot be employed in any capacity given the total circumstances of their disease or disability;

(2) whether the applicant has been completely disabled for one year or more during which time the applicant was medically incapable of employment for remuneration; and,

(3) a prognosis of the permanence of the disability.

Article 1.5 of this Regulation defines a permanent and total disability as:

".....medically diagnosed physical, sensory or mental condition, disease or disability rendering him or her incapable of any work for remuneration and where the Ministry has assessed the person and subsequently decides that they fulfill the medical criteria set out in this Law."

The applicant, Avdullah Beqiri, has submitted some of his medical records. Those records reflect that he suffers from coronary heart disease and that

he has been treated for that disease. The treatment has included a successful coronary bypass surgery. None of those records suggests that the applicant, Avdullah Beqiri, cannot work for remuneration nor do they suggest that he was not medically able to work for remuneration for a year or more. None of those medical records suggest that he has a permanent disability.

II. Allegations of the Applicant

Applicant alleges that the decision of the Ministry of Labour and Social Welfare and the Judgment of the Supreme Court of Kosovo violates the **Constitution of the Republic of Kosovo**. He does not describe what specific provisions of the **Constitution** are violated.

III. Response of Opposing Party or Other Interested Parties

Neither the Ministry of Labour and Social Welfare nor the Supreme Court of Kosovo filed a formal response.

The government authorities and the Supreme Court appear to believe that:

(1) the Applicant has not proven that he is disabled as that term is defined by applicable law; and,

(2) that he was given a fair and thorough opportunity to present his claim and a fair opportunity to appeal and litigate his appeal from the adverse decision of the Ministry of Labour and Social Welfare.

After having heard the judge rapporteur, Mr. Robert Carolan, and the positions of the parties as described in the documents in the court file with respect to the referral and after having discussed the matter in its entirety in the deliberations held on 24 November 2009 the Court finds and concludes the following:

Assessment of the Admissibility of the Referral

Article 51 of the Constitution provides:

1. “Healthcare and social insurance are regulated by law.”

2. “Basic social insurance related to unemployment, disease, disability and old age shall be regulated by law.”

Article 54 of the Constitution provides:

> "Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated."

The Applicant, Avdullah Beqiri, appears to rely upon the above-referenced provisions of the Constitution in support of his claim although he does not specifically state what provisions of the Constitution support his claim.

It appears that the Applicant has exhausted all of his remedies provided by law which is a pre-condition to his having a right to make an admissible referral to this Court. *See* **Section 7 of Article 113** of the **Constitution of the Republic of Kosovo.**

The Applicant's grievance is limited to his disagreement with the conclusions the administrative agencies made about the facts of his individual claim and his speculation that those agencies did not appropriately consider all relevant evidence in evaluating his claim suggesting that he believes that he did not receive an effective legal remedy for his right to disability insurance as regulated by law. *See* **Articles 51 and 54 of the Constitution of the Republic of Kosovo**.

The Applicant received a complete and fair administrative hearing as well as a fair and complete administrative appeal of that decision. The Supreme Court thoroughly reviewed Applicant's complaint and accurately assessed his appeal and properly concluded that the applicable law on disability claims was applied in his case and that he was afforded a complete and thorough hearing with respect to his claims. *Therefore, Applicant's referral is not admissible and it should be denied.*

Assessment of the Substantive Legal Aspects of the Referral

There is no substantive legal basis for the Applicant's referral because he was allowed a thorough, complete and fair hearing of his claim pursuant to the applicable law relating to disability claims. *Therefore,, the Applicant's referral should be denied.*

FOR THESE REASONS THE COURT RENDERED ITS DECISION AND RESOLVED:

I. To declare as inadmissible the application regarding the Applicant's claim for disability benefits from 1 January 2004 through the present time.

II. Notify the applicant, Mr. Avdullah Beqiri, the opposing party, the Ministry of Labour and Social Welfare, and for informational purposes, the Supreme Court of Kosovo.

III. This decision enters into force and effect immediately.

Judge Rapporteur	**President of the Court**
Robert Carolan, signed	Enver Hasani, signed

AAB-Rinvest University vs. Decision no. 01/73 of the Government of the Republic of Kosovo

Case KI 41/09, decision of 27 January 2010
Keywords: referral filed by a legal person, academic freedom, equality before law.

The applicant filed a referral alleging that decision no. 01/73 of the Government of Kosovo, by which the applicant was given the name "College" instead of "University", was in violation of the Constitution and applicable law. The applicant claimed that the Government was not authorized and had no legal and constitutional grounds to issue the above mentioned decision, since no provision of applicable law, including the applicable law on higher education, gives the Government the authority to issue such a decision. At the same time, the applicant considered that the challenged decision had violated Article 48.2 of Constitution, thus violating academic freedom and Article 24 of the Constitution, which guarantees equality before law.

The Court rejected the referral as inadmissible, with reasoning that the applicant cannot be considered to have met the requirements of Article 113.7 of the Constitution, which provides that "individuals are authorized to refer violations by public authorities ... only after exhaustion of all legal remedies provided by law". The Court found that the applicant had failed to submit any evidence to show he had appealed against the Government decision, or he has used other legal remedies available by law. Further, the Court underlined that individual applicants are required to exhaust only legal remedies that are effective, stating that discretionary or extraordinary remedies need not be exhausted.

Pristina, 27 January 2010
Ref.: No. RK 04/10

RESOLUTION

Case No. KI 41/09,
AAB-RIINVEST University L.L.C., Pristina
vs.
Government of the Republic of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Snezhana Botusharova, Judge

Robert Carolan, Judge
Ivan Čukalovič, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjyljeta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

With Mrs. Njomza Uka, Officer for Case Registration, as minute taker at the Court's deliberation of 25 November 2009 in Case No. KI. 41/09.

The Applicant

1. The Applicant is a private provider of higher education, bearing the name "AAB-RIINVEST University", with its Headquarters in Pristina and represented by its Secretary, Granit Curri.

The Opposing Party

2. The Opposing Party is the Government of the Republic of Kosovo.

Subject matter

3. The applicant alleges that Decision No. 01/73 of the Government of 7 July 2009, whereby the Applicant was granted the title "College", is in full contradiction with the Constitution and the Law, in that the Government was not competent to take such a decision. The Applicant holds that the Government's Decision lacked any constitutional and legal basis and violated Articles 24, 48.2 and 93.4 of the Constitution and Articles 7 and 8.2 of Law No. 03/L-121 on the Constitutional Court.

Legal Basis

4. Article. 113.7 of the Constitution of the Republic of Kosovo (thereinafter referred to as: the Constitution); Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (thereinafter referred to as: the Law), and Article 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (thereinafter referred to as: the Rules of Procedure).

Summary of the proceedings before the Court

5. On 25 November 2009, the Court decided to reject the Applicant's request for interim measures, as asked for in the Referral, and, upon the proposal of the Review Panel, composed of the Judges Gjylieta

Mushkolaj, Almiro Rodrigues and Altay Suroy and acting under Article 22.6 of the Law, to adjudicate the Applicant's constitutional complaints on the same day.

The facts

6. By Decision No. 01/73 of 7 July 2009, taken pursuant to Article 92.4 and 93.4 of the Constitution and Article 4.3 of the Regulation on the Functions of the Government of Kosovo No. 01/2007, and based on the recommendations of the National Quality Council of the Kosovo Accreditation Council, the Government decides that:

    1. None of the Private Higher Educational Providers (PHEP) in the Republic of Kosovo can actually take the name University, can grant academic titles for teachers, nor can they offer doctoral studies.

    2. Every PHEP in the Republic of Kosovo, which in compliance with the recommendations of the National Quality Council (NQC) of the Kosovo Accreditation Agency (KAA), has fulfilled standards and criteria foreseen by the Law on Higher Education and respective administrative instructions, takes the name "College".

    3. In compliance with the recommendations of the NQC of the KAA, the name "College" is granted to the following PHEP: AAB-RIINVEST,...

    7. The PHEP AAB-RIINVEST is granted the status "College" with the following study programes:....

    21. Every PHEP, which has the name "College", can enroll up to 500 students in the Master programs.

    24. The Ministry of Education, Science and Technology is given the authority to grant licenses according to this Decision.

    25. The accreditation and the license are legal only for the academic year 2009/2010...

    28. This Decision enters into force on the day of the signing."

7. On 23 September 2009, the Applicant filed a constitutional complaint, requesting the Court to evaluate the constitutionality and legality of Decision No. 01/73 of the Government, by which the Applicant was granted the name "College".

The Applicant's allegations

8. The Applicant considers that Decision 01/73 is in contradiction with the Constitution and the Law, in that the Government was not authorized and had no constitutional and legal basis for issuing the Decision, as no provision or any bylaws, including the Law on Higher Education and Administrative Instructions No. 14/2003 (Licensing of Private Providers of Higher Education), No. 2/2009 (Accreditation of Institutions of Higher Education) and No. 14/2004 (Establishment of the Kosovo Accreditation Agency), determined the right of the Government to issue a decision, legal act or regulation needed to implement these laws and bylaws.

9. Furthermore, the Applicant considers that the contested decision has violated:

   Article 48.2 (Guarantee of Academic Freedom) of the Constitution, in that the Government, through its decision and contrary to the Law on Higher Education and the Applicant's right to academic freedom, has set the maximum number of students which can be enrolled by a private provider of higher education and has imposed the term "College" on the Applicant, even though it meets the legal requirements to carry the term "University".

   Article 24 (Equality before the Law) of the Constitution, in that the Government, through the specified number of accredited programs, has treated private providers of higher education equally regardless of the number of such programs. Even if limiting the number of students would be legal, the proper way would have been proportional treatment based on the number of accredited programs, which meant higher costs with a proportionally smaller income, resulting, therefore, in a materially unequal situation, putting AAB-RIINVEST into a position in breach of Article 24 of the Constitution and not justified under its Article 55.

   Article 93 (Competencies of the Government), paragraph 4, of the Constitution, providing that the Government "makes decisions and issues legal acts or regulations necessary for the implementation of laws".

10. Finally, the Applicant alleges that, although Article 113.7 of the Constitution requires an applicant to exhaust all legal remedies provided by law, one cannot do so, if there are no legal remedies. In his opinion, this is also true for the Government's decision, because it is final and cannot be revoked by a party either through an administrative appeal or the beginning of an administrative conflict or through an extraordinary legal remedy.

Comments by the Opposing Party

11. The Opposing Party, to which the Referral was communicated by the Court's Registry Office on 2 October 2009, has not submitted its comments within the time limit of 45 days, as stipulated by Article 22.2 of the Law.

Assessment of the Admissibility of the Referral

12. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution.

13. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

    "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."

14. The Court first considers that, pursuant to Article 21.4 of the Constitution, which provides that: "fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable", the Applicant is entitled to submit a constitutional complaint, invoking fundamental rights which are valid for individuals as well a for legal persons as the Applicant. This means that the Applicant is equally under the obligation to exhaust all legal remedies provided by law, as Article 113.7 stipulates for individuals.

15. The Court notes, however, that in his Referral, the Applicant has not submitted any evidence whatsoever, that he appealed from the decision of the Government or used any other remedy, which may have been open to him under applicable law in order to challenge the contested decision.

16. The Court wishes to emphasize that the rationale for the exhaustion rule, as interpreted by the European Court of Human of Rights (see Article 53 of the Constitution), 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. This is an important aspect of the subsidiary character of the Constitution. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). 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 is satisfied (see, mutatis mutandis, ECHR, Azianas v. Cyprus, no. 56679/00, decision of 28 April 2004).

17. In this connection, the Court would like to stress that applicants are only required to exhaust remedies that are available and effective. Discretionary or extraordinary remedies need not to be exhausted, for example requesting a court to revise its decision (see, mutatis mutandis, ECHR, Cinar v. Turkey, no. 28602/95. decision of 13 November 2003). Where an applicant has tried a remedy that the Court considers inappropriate, the time taken to do so will not interrupt the running of the four-month time limit (Art. 49 "Deadlines" of the Law), which may lead to the complaint being rejected as out of time (see, mutatis mutandis, ECHR, Prystavka, Rezgui v. France, no 49859/99, decision of 7 November 2000).

18. As to the present case, the Applicant, after having received the Government's Decision, submitted its constitutional complains directly to this Court, arguing that there were no legal remedies and that "this is also true for the decision of the Government, which, as such, is final and cannot be revoked through an administrative appeal or through the beginning of an administrative conflict or an extraordinary remedy."

19. The Court, however, notes that Chapter IX – Disputes of Law No. 2002/3 on Higher Education in Kosovo of 26 September 2002, in its Section 32, provides that "Every attempt shall be made to resolve disputes between government and public authorities and providers of higher education by negotiation and mediation and it shall be the duty of the Ministry to promote this" (Section 32.1), as well as "If a dispute cannot be resolved by informal means, it may be referred by either party to a court of competent jurisdiction" (Section 32.2)

20. Furthermore, Law No. 02/L-28 on the Administrative Procedure of 22 July 2005, in its Section IX, provides that "Any interested party has a right to appeal against an administrative act or against unlawful refusal to issue an administrative act" (Article 127.2), while "The administrative body the appeal is addressed to shall review the legality and consistency of the challenged act" (Article 127.3). "The interested parties may address the court only after they have exhausted all the administrative remedies of appeal (Article 127.4).

21. However, in its submissions, the Applicant has not substantiated in whatever manner, why it considers that the legal remedies mentioned in both laws would not be available and, if available, would not be effective and, therefore, not need to be exhausted.

22. In these circumstances, the Applicant cannot be considered to have fulfilled the requirements under Article 113.7 of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Article 55 of the Rules of Procedure, by majority vote,

DECIDES

I. TO REJECT the Referral as inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova, signed	Prof. Dr. Enver Hasani, signed

Emrush Kastrati vs. the Supreme Court of Kosovo Decision Pkl. Nr. 120/08

Case KI 68/09, decision of 19 February 2010
Keywords: individual referral, interim measure, judicial immunity, independence of judiciary

The applicant filed a request for interim measure against the Supreme Court Judgment for approval of the request for protection of legality in favour of the opposing party which will enable it to conduct a criminal procedure against the applicant of this referral for the alleged issuing of illegal judicial decision. According to the applicant, this decision, respectively the criminal proceedings against him violate his judicial immunity and the independence of the judiciary. The Constitutional Court decided to reject the request of the applicant for interim measure as inadmissible with the reasoning that he did not present any convincing argument which would justify the suspension of criminal proceedings which are conducted before the Municipal Court and that the interim measure would be necessary to avoid an irrecoverable damage or that such a measure will be in public interest.

Pristina, 19 February 2010
Ref. No.: MP 16/10

DECISION ON THE REQUEST FOR INTERIM MEASURES
In
Case No. KI 68/09,
Emrush Kastrati
vs.
Decision of the Supreme Court of Kosovo,
Pkl. No. 120/08, dated 1 September 2009

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
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Having deliberated on the request for interim measures of the Applicant, Emrush Kastrati the Court adopts the following **Decision** unanimously and without prejudice to any further decision to be made by the Court on admissibility or on the merits:

Introduction

The Applicant

1. The Applicant is Emrush Kastrati, a Judge of the Municipal Court in Malisheva, Hamdi Berisha Street nn, Mirdita Neighbourhood, Malisheva.

The Challenged Decision

2. The Decision challenged by the Applicant is a Decision of the Supreme Court of Kosovo, Pkl. No. 120/08, dated 1 September 2009.

Subject Matter

3. On 3 December 2009 the Applicant, Emrush Kastrati, lodged a referral to the Constitutional Court of the Republic of Kosovo requesting Interim Measures against the implementation of the Decision of the Supreme Court of Kosovo Pkl. No. 120/08, dated 1 September 2009 on the basis that the Supreme Court had undermined the independence of the judiciary in reaching its decision.

4. The Applicant pleaded that the Decision violates Article 107.1 of the Constitution of Kosovo which provides for judicial and prosecutorial immunity. Article 107, in full, states as follows:

Article 107 [Immunity]

1. *Judges, including lay-judges, shall be immune from prosecution, civil lawsuit and dismissal for actions taken, decisions made or opinions expressed that are within the scope of their responsibilities as judges.*

2. *Judges, including lay-judges, shall not enjoy immunity and may be removed from office if they have committed an intentional violation of the law.*

3. *When a judge is indicted or arrested, notice must be given to the Kosovo Judicial Council without delay.*

Legal Basis

5. Article. 116.2 of the Constitution of the Republic of Kosovo, Article 27 of the Law on the Constitutional Court of the Republic Kosovo (the Law) and Article 52.1 of the Rules of Procedure of the Constitutional Court (the Rules).

The Facts

6. The Office of the Municipal Public Prosecutor for Prizren brought an indictment against the Applicant, PP. No. 2085/2008 dated 27 August 2008 for the criminal offence, of issuing an unlawful judicial decision, as provided for in Article 346 of the Criminal Code of Kosovo.

7. The Municipal Court of Deçan as the criminal court of first instance, in a Decision KA. No. 14/2008 also dated 27 August 2008, overturned the charges filed by the Public Prosecutor on the grounds that the prosecution was that there was not sufficient proof to support a grounded suspicion that the Applicant had committed the criminal offence with which he was charged.

8. By a Decision KA. no. 14/2008 dated 7 October 2008, a panel of the Municipal Court of Deçan upheld that finding and rejected the Appeal which had been brought against the original decision of the Municipal Court by the Public Prosecutor.

9. On 01 September.2009 the Supreme Court of Kosovo, in its review of request for protection of legality, filed by the Public Prosecutor against that decision, issued a Judgment PKL. nr. 120/08, finding the request for protection of legality grounded, and finding that the disputed Decision issued in favour of the Applicant was not in accordance with a proper interpretation of Articles 304 to 316 of the Criminal Procedure Code of Kosovo.

Conclusion

10. The Court after having considered the report of the Judge Rapporteur, Iliriana Islami, and having deliberated on the matter on 19 February 2010 concluded that the request for interim measures should be rejected. The Court finds that the Applicant has not submitted sufficient evidence or reasons to justify interfering with the criminal proceedings pending in the Municipal Court. The Applicant has not established that the interim measures are necessary to avoid any risk of irreparable damages nor that those interim measures are in the public interest, as required by Article 27 of the Law on the Constitutional Court.

FOR THESE REASONS

The Constitutional Court, without prejudice to any further decision to be made by the Court on admissibility or on the merits, pursuant to Article 27 of the Law and Section 52.1 of the Rules, unanimously, in its session of 19 February 2010:

DECIDES

I. To reject the request for an Interim Measure;

II. This Decision is to be notified to the parties;

III. This Decision shall be published in accordance with Article 20.4 of the Law on the Constitution of Kosovo and is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Prof.Dr.Iliriana Islami, signed	Prof. Dr. Enver Hasani, signed

Mimoza Kusari - Lila vs. Central Election Commission

Case KI 73/09, decision of 23 March 2010
Keywords: individual referral, interim measure, constitutionality, freedom of election and participation, judicial protection of rights

The applicant filed a referral whereby she requests the assessment of constitutionality and legality of the Central Election Commission (CEC) Decision which according to her certified the election results without waiting for the outcome of all appeals that were filed before the Supreme Court by her political entity, following the rejection thereof by the Election Complaints and Appeals Commission (ECAC). She claimed that by taking such a decision, the CEC violated her freedom of election and participation as well as judicial protection of rights. At the same time, the applicant had requested for imposition of the interim measure whereby she requested for annulment of election results in the municipality of Gjakova in the polling stations where the election process was violated, while the Constitutional Court rejected such a request through a previous Resolution. The Constitutional Court decided to reject applicant's referral as inadmissible because the applicant, through this procedure, seeks the protection of her individual rights, for which she needs to exhaust all legal remedies which was not the case here. The court recalls that Article 119 of the Law on General Elections allows every person with legal interest in an issue under the jurisdiction of ECAC to file an appeal, while these remedies were used by the political entity of the applicant which filed an appeal to ECAC and the Supreme Court, rather than individual referral as it was the case with her at the Constitutional Court. Consequently, based on the above, the Court decided to announce the referral of the applicant as inadmissible due to non-exhaustion of legal remedies.

Pristina, 23 March 2010
Ref. No.: AGJ 08/10

RESOLUTION ON INADMISSIBILITY
In
Case No. KI 73/09,
Mimoza Kusari-Lila
vs.
The Central Election Commission

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
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Having issued a **Decision,** dated 26 February 2010, rejecting the request for interim measures of Ms Mimoza Kusari-Lila the Court unanimously adopts the following Resolution on Inadmissibility in relation to her Referral:

The Applicant.

1. The Applicant is Ms Mimoza Kusari-Lila, who was a candidate for Mayor of Gjakovë/Đakovica in the Local Government elections held in Kosovo on 15 November 2009 representing a political party, the New Kosovo Alliance (NKA).

The Responding Party

2. The Responding Party is the Central Election Commission (CEC) as established by Article 139 of the Constitution of Kosovo.

Subject Matter of the Referral

3. On 10 December 2009 the Applicant, lodged a referral to the Constitutional Court of the Republic of Kosovo requesting:

   a) An assessment of the constitutionality and legality of the decision of the CEC to certify the results of local elections held on 15 November 2009, without having considered the results of all the complaints and appeals lodged.

   b) The granting of interim measures annulling the election results in the Municipality of Gjakovë/Đakovica, at polling stations where election process had been violated and ordering new elections under the supervision of the CEC.

The Facts

4. Following the local elections held in Kosovo on 15 November 2009 the NKA, not Ms Mimoza Kusari-Lila, lodged a number of appeals to the Election Complaints and Appeals Committee (ECAC) concerning alleged irregularities observed during the election. However, following

consideration of the matter the ECAC rejected these appeals. The NKA appealed two of these decisions of the ECAC to the Supreme Court of Kosovo. The Supreme Court of Kosovo rejected these appeals by Decisions given on 4 December 2009, A.nr 929/2009 and A.nr.931/2009.

5. The NKA, again, not Ms Mimoza Kusari-Lila, addressed a further appeal to the Supreme Court of Kosovo on the basis that the CEC certified the local elections results without all prior procedures being properly concluded, which they allege amounted to a violation of Article 106.1 of the Law on General Elections in the Republic of Kosovo, Law No. 03/L-073,. The Supreme Court of Kosovo also rejected this appeal on 4 December 2009, A.nr.930/2009.

Legal Basis for the Application

6. Article 113.7 of the Constitution of the Republic of Kosovo, and Article 47 of the Law of the Constitutional Court. Law No. 03/L-121.

Summary of the proceedings before the Court

7. On 10 December 2009, the Applicant lodged with the Constitutional Court a referral in her own name and on her own behalf.

8. The President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur. A Review Panel consisting of Judges Snezhana Botusharova, Chair, Enver Hasani and Iliriana Islami was established.

9. Based on the preliminary report of Judge Ivan Čukalovič the Review Panel recommended and the full Court accepted a public hearing to be hold for the purposes of establishing facts in relation to the matter, to enable the parties to be heard and to determine if there were elements justifying granting the interim measures as requested by the Applicant.

10. On 9 February 2010 a public hearing was held at the Faculty of Law, Pristina. The Applicant appeared on her own behalf and Ms Nesrin Lushta appeared as Chairperson of the Central Election Commission.

11. On 26 February 2010, the Court deliberated on the matter and decided to reject the Applicant’s referral as inadmissible.

Summary of the Hearing on 9 February 2010

12. The Applicant indicated that, following a total of 15 complaints by her party NKA, the ECAC annulled results from 15 polling stations including

8 in the Municipality of Gjakovë/Đakovica. She pointed out that by the 4 December 2009, the date of the final certification by the CEC, the Supreme Court had not issued decisions lodged by her party.

13. Ms Nesrine Lushta for the CEC emphasised that at all times the CEC acted within the law in ensuring that all claims against the election counting and results process had been finalised prior to the final certification of the results of the elections. She stated that the CEC relied specifically on Article 106 of the Law on General Elections (which applies, where appropriate, to Local Elections also) which provides that "The CEC shall certify election results after completion of all polling station and counting procedures and when all outstanding complaints concerning polling and counting have been adjudicated by the ECAC and the Constitutional Court."

14. When asked during the hearing whether she had submitted and signed any complaint or appeal to ECAC or Supreme Court, she replied that the person who had signed the appeals to the ECAC had acted on her behalf, and that she was the coordinator for the election office/team for the candidate for Mayor for the Municipality of Gjakova.

15. She was asked why this person, acting on her behalf in the proceedings before the ECAC and the Supreme Court, had not signed the referral to the Constitutional Court on her behalf. She replied that that person, on her behalf and with her consent, had signed and submitted the documents to ECAC, as the head of the election group residing in Gjakova. With regard to the Appeal to Supreme Court, they had prepared it together and signed it. With regard to the referral to the Constitutional Court she stated that she was in charge of the entire appeals process, therefore she has signed it for the Constitutional Court.

16. In sum, the Applicant, admitted that it was correct that she had not signed any complaint or appeal to ECAC or Supreme Court. However, she also restated that everything was done with her consent, as she was personally involved in discussions and meetings with the witnesses and people who were bringing in documents and providing information about misconduct on the day of the election.

17. In response to what were the precise legal provisions of the Constitution on which she supports her allegation, she stated that she relied on Article 45 [Freedom of Election and Participation] and Article 54 [Judicial Protection of Rights].

18. In addition, when asked how her constitutional right to be elected has been violated, she considered that the freedom of election and

participation was violated. According to Article 45 her right to be elected has been denied because of the manner of rendering decisions by the ECAC.

19. The minutes of the meeting of the CEC of 4 December 2009, provided by Ms Lushta in the hearing, indicated that the Commission was aware of Appeals that were pending. Indeed the CEC had postponed their decisions for some hours pending the receipt of information from the Supreme Court in relation to those Appeals. Previously, on 1 December 2009, the CEC had written to the Constitutional Court asking if any cases in relation to the elections were pending before it and, by letter of the same date, the Court had replied that there were no such cases. Ms Lushta did not address Article 118.4 of the Law on General Elections which provides that an appeal shall lie to the Supreme Court from decisions of the ECAC in certain circumstances.

Elections

20. Article 45 of the Constitution of Kosovo provides:

Article 45 [Freedom of Election and Participation]

1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.

2. The vote is personal, equal, free and secret.

3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies.

21. According to Article 22 of the Constitution of Kosovo the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols are directly applicable in the Republic of Kosovo. They form part of its domestic law. Article 3 of the First Protocol provides for the right to free elections. It provides that free elections shall be held "...at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people..."

22. Article 123.2 of the Constitution of the Republic of Kosovo provides that "Local self-government is exercised by representative bodies elected through general, equal, free, direct and secret ballot elections." The Assembly of Kosovo has provided a mechanism for the holding of

General and Local Elections by the enactment of the Law on General Elections, Law No. 03/L-073, in the Republic of Kosovo and the Law on Local Elections in the Republic of Kosovo, Law No. 03/L-040.

23. The natures of the rights to vote in elections and to stand for elections are differentiated by the case law of the European Court of Human Rights (ECtHR). The Court has pointed out that the right to vote is an active right and the right to stand for election is a passive right. The Applicant maintains that her right to be elected has been violated. There is a difference, however, between the right to be elected and the right to stand for election. The jurisprudence of the ECtHR points to the considerable leeway that States have in devising electoral systems and they allow a wide margin of appreciation as to how elections are conducted and how results are certified. In the case of United Communist Party of Turkey v Turkey the Court stated that "...[States] have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see Sadak and Others (no. 2) v. Turkey, nos. 25144/94 et al., § 31, ECHR 2002-IV).

24. The ECtHR has consistently expressed the importance of free elections and of democracy in its Judgments. In the same Judgment the Court expressed its view in the following terms "Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it." The ECtHR in the same Judgment quoted, with approval, The Code of Good Practice was adopted by the European Commission for Democracy through Law (Venice Commission) at its 51st (Guidelines) and 52nd (Report) sessions on 5-6 July and 18-19 October 2002 (Opinion no. 190/2002, CDL-AD (2002) 23 rev.). There the Venice Commission stated:

The five principles underlying Europe's electoral heritage are universal, equal, free, secret and direct suffrage*. Furthermore, elections must be held at regular intervals.*

25. The Venice Commission points out that the organisation of elections should be overseen by an impartial body in charge of applying electoral law and that there be an effective system of appeal. Under the law in Kosovo these two functions are performed by the CEC and the ECAC, respectively, subject to such court appeals as may be permitted by law. These are the bodies that decide on all matters relating to the running of

elections, certification of results and who adjudicate on complaints and permitted appeals concerning the electoral process, as established by law and the electoral rules. They are permanent independent bodies.

26. The rationale for the CEC and the ECAC having such authority lies in the proposition that there must be certainty in the electoral process. The necessity of certainty in the electoral process requires the annulling of elections only for the most serious violations and a high burden of proof lies with whoever alleged such violations.

27. The role of the Constitutional Court in the electoral process is recognized by the Law on General Elections where it is provided in Article 106.1 that the CEC shall certify election results after complaints have been adjudicated upon by the ECAC and by the Constitutional Court. This Court has no other role in these electoral processes and it cannot revisit or overturn the decisions of the CEC or the ECAC, subject to the important provision that the Court will do so if there has been a violation of the individual rights and freedoms guaranteed by the Constitution.

Assessment of the Admissibility of the Referral

28. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this connection, the Court refers to Article 113.7 of the Constitution, which provides: "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."

29. 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. This is an important aspect of the subsidiary character of the Constitution. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). 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 is satisfied (see, mutatis mutandis, ECtHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).

30. This Court applied this same reasoning when it issued a Decision on 27 January 2010 on inadmissibility on the grounds of non exhaustion of

remedies in the case of AAB-RIINVEST University L.L.c., Pristina vs. Government of the Republic of Kosovo, Case No. KI. 41109.

31. Bearing Article 113.7 of the Constitution in mind the Court now looks carefully at the steps taken by NKA and the Applicant in relation to the appeals lodged and in particular by whom they were lodged. Having heard the Applicant at the public hearing and having had the opportunity to examine the appeal papers tendered in evidence the following facts become clear.

32. As was clear from the evidence and from the hearing the political party NKA lodged the appeals to the ECAC and to the Supreme Court, not the Applicant. The first mention in any of the documentation before this Court of the name of the Applicant is in the Referral to the Constitutional Court which was received by the Court on 10 December 2009. The NKA has made no Referral to the Constitutional Court.

33. Political parties, as associations of citizens, have special recognition in the democratic process as an important component of a healthy civil society (see mutatis mutandis Gorzelik v Poland, 2004 ECtHR, Grand Chamber, para 93). That Court has said that freedom of expression of opinion in the choice of legislature is inconceivable without the participation of a plurality of political parties representing different shades of opinion to be found in a country's population. By relaying this range of opinion political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society (see United Communist Party of Turkey v Turkey, 1998, ECtHR, Grand Chamber, para 89).

34. The Fundamental Principles set out in the Law on General Elections also gives special consideration to the political parties in recognizing that they are entitled to campaign, and they are entitled to equality of opportunity of radio and television airtime, public funds and other support.

35. The Applicant was at all relevant times a member of the political party which enjoyed those rights and which made use of the appeals procedure available to it. The Applicant was also free to pursue such appeals in her own name, if she so wished. However, she did not do so.

36. Article 119 of the Law on General Elections allows any person who has a legal interest in a matter within the jurisdiction of ECAC to submit a complaint to the ECAC. In this case, the facts have established that the Applicant did not make such a complaint. Therefore, she did not exhaust all legal remedies provided by law. Having exhausted all remedies is a

requirement for her to be able to challenge the constitutionality of the decisions that she wishes to refer to the Constitutional Court.

Conclusion

37. The Court after having heard the parties at a public hearing on 9 February 2010 and having considered all the facts and the evidence tendered, and having deliberated on the matter on 19 February 2010 unanimously:

DECIDES

I. TO REJECT the Referral as inadmissible.

II. 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 on the Constitutional Court.

III. This Decision is effective immediately.

Done at Pristina this day of March 2010

Judge Rapporteur	**President of the Constitutional Court**
Prof. Dr. Ivan Čukalović, signed	Prof. Dr. Enver Hasani, signed

Mimoza Kusari - Lila vs. the Central Election Commission

Case KI 73/09, decision of 26 February 2010
Keywords: individual referral, interim measures,

The applicant filed a request for granting interim measures by annulling the election results in the municipality of Gjakova in the polling stations where she contends that "election process was violated" and requests for ordering of new elections under the supervision of Central Election Commission (CEC).

The Constitutional Court decided to reject applicant referral for interim measure with the reasoning that the applicant did not present sufficient evidence which would justify the annulment of elections and ordering of new elections by not specifying that imposition of such measures is necessary to avoid an irrecoverable damage or if such a measure is in public interest.

Pristina, 26 February 2010
Ref. No.: MP 06/10

DECISION ON THE REQUEST FOR INTERIM MEASURES
in
Case No. KI 73/09,
Mimoza Kusari – Lila
vs.
The Central Election Commission

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Snezhana Botusharova, Judge
Robert Carolan, Judge
Ivan Čukalovič, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjyljeta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

Having deliberated on the request for interim measures of Ms. Mimoza Kusari-Lila the Court adopts the following **Decision**:

The Applicant

1. The Applicant is Ms. Mimoza Kusari-Lila, representing the political party, New Kosovo Alliance (NKA) a candidate for Mayor of Gjakovë/Đakovica in the Local Government elections held Kosovo on 15 November 2009,

The Responding Party

2. The Responding Party is the Central Election Commission (CEC) as established by Article 139 of the Constitution of Kosovo.

Subject Matter

3. On 10 December 2009 the Applicant, Ms Mimoza Kusari-Lila, lodged a referral to the Constitutional Court of the Republic of Kosovo requesting.

   a) An assessment of the constitutionality and legality of the decision of the CEC to declare the results of local elections, held on 15 November 2009, without having considered the result of all the complaints and appeals lodged.

   b) The granting of interim measures annulling the election results in the Municipality of Gjakovë/Đakovica, at polling stations where the election process had been violated and ordering new elections under the supervision of the CEC.

The Facts

4. Following the local elections held in Kosovo on 15 November 2009 the NKA lodged a number of appeals to the ECAC concerning alleged irregularities observed during the election. However, following consideration of the matter the ECAC rejected these appeals. The NKA appealed two of these decisions of the ECAC to the Supreme Court of Kosovo. The Supreme Court of Kosovo rejected these appeals by Decisions given on 4 December 2009.

5. The NKA addressed a further appeal to the Supreme Court of Kosovo on the basis that the CEC declared the local elections results without all prior procedures being properly concluded, which they allege amounted to a violation of Article 106.1 of the Law on General Elections in the Republic of Kosovo. The Supreme Court of Kosovo also rejected this appeal on 4 December 2009.

Legal Basis

6. Article 116.2 of the Constitution of the Republic of Kosovo, Article 27 of the Law on the Constitutional Court of the Republic of Kosovo and Article 52.1 of the Rules of Procedure of the Constitutional Court.

HOLDING

7. The Court after having considered the report of Judge Rapporteur Ivan Čukalovič and having heard the parties at a public hearing on 9 February 2010 and having deliberated on the matter on 19 February 2010 concluded, without prejudice to any final Decision on the Referral as to admissibility or on the merits, that the request for the interim measures should be rejected. The Court finds that the Applicant has not submitted sufficient evidence to justify the annulling of the elections and the ordering of new elections under the supervision of the CEC. The Applicant has not established that the interim measures are necessary to avoid any risk of irreparable damages nor that those interim measures are in the public interest, as required by Article 27 of the Law on the Constitutional Court.

FOR THESE REASONS THE COURT UNANIMOUSLY DECIDES:

I. To reject the request for interim measure;

II. This Decision is to be notified to the parties;

III. This Decision shall be published in accordance with Article 20.4 of the Law on the Constitution of Kosovo and is effective immediately.

Done at Pristina this 26 day of February 2010.

President of the Constitutional Court
Singed: Prof. Dr. Enver Hasani, signed

Qemajl Kurteshi vs. the Municipal Assembly of Prizren

Case KO 01/09, Decision of 18 March 2010
Key words: referral by the Deputy Chairperson of the Municipal Assembly for Communities, Equality before Law, local self-government, logo, community rights.

The applicant, the Deputy Chairperson of the Municipal Assembly for Communities in the Municipality of Prizren, filed a referral challenging Article 7 of the Municipal Statute on the Municipal Emblem containing the house of the League of Prizren, the year 1878 and the inscription "Prizren", thereby alleging that proceedings foreseen under the law have not been respected, and that requests and remarks of communities related to the emblem were not taken into account, and that this emblem does not reflect multi-ethnicity of the Municipality. He claims that constitutional rights of other non-majority communities in the Municipality were violated for equality before law, protection, preservation and development of their identity, that there was violation of the Law on Local Self-Government, and of the Law on Protection and Promotion of Community Rights.

The Constitutional Court decided that when the Municipality decided to proclaim the emblem with the house of the Prizren League associated with the year 1878, they promoted Albanian heritage and tradition, without due regard to other communities, thereby violating rights of non-majority communities in Prizren to protect, maintain and promote their identity. Further, the Court decided that the Article 7 of Statute of the Municipality is not compatible with the Constitution, and ordered the Municipality of Prizren to amend it in order to ensure compliance with the Constitution.[1]

Pristina, 18 March 2010
Ref. No. AGJ 07/10

JUDGMENT

Case No. KO 01/09,
Ćemailj Kurtiši
And
The Municipal Assembly of Prizren

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

[1] The Constitutional Court decided to extend the time limit imposed by the Court in its Judgment of 18 March 2010 by a further period of three months from that date with Order No.:URDH.27 /1, of 18 June 2010.

Enver Hasani, President
Snezhana Botusharova, Judge
Robert Carolan, Judge
Ivan Čukalović, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjylieta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

Having deliberated on the referral of Mr Ćemailj Kurtiši, Deputy Chairperson for Communities of The Municipality of Prizren gives JUDGMENT as follows:

Introduction

The Applicant

1. The Applicant is Mr Ćemailj Kurtiši, the Deputy Chairperson for Communities of the Municipal Assembly of Prizren, Republic of Kosovo.

The Opposing Party

2. The Opposing Party is the Municipal Assembly of Prizren, Republic of Kosovo.

Date of Filing of the Referral

3. The referral was filed with the Constitutional Court on 22 April 2009.

Date of Hearing

4. The Constitutional Court held a public hearing in relation to the case on 30 November 2009.

Deliberations of the Court

5. The Court deliberated on the case in private session on 27 January 2010.

Summary of the Proceedings

6. On 22 April 2009, Ćemailj Kurtiši, Vice Chairperson of the Municipality of Prizren, filed a referral to the Constitutional Court of Kosovo. Mr Kurtiši claimed that Article 7 of the Statute of the Municipality of Prizren was in violation of Articles 3.1, 6.1, 58.1 and 59.1 of the Constitution. On

4 August 2009, the Constitutional Court informed the Municipality of Prizren of the making of the referral by Mr Kurtiši and requested the Municipality to reply to the referral. On 2 October 2009, the President and the Mayor of the Municipality replied to the referral

7. The President of the Court appointed[2] Judge Almiro Rodrigues as Judge Rapporteur and a Review Panel consisting of Judges Altay Suroy, Snezhana Botusharova and Ivan Čukalovič was established. On 7 October 2009, the Applicant was requested to clarify and supplement the referral by stating how and why the alleged violation was unconstitutional, in what capacity he signed the referral and to provide evidence of his position in the Municipality of Prizren. On 12 October 2009, Mr Kurtiši replied and provided the information requested. On 12 November 2009, Judge Rodrigues presented a report, for the consideration of the Review Panel. On 26 November 2009, the Review Panel convened to consider the Judge Rapporteur's report. On 30 November 2009, a public hearing was held. Mr Kurtiši appeared on his own behalf; the Municipality of Prizren was not present. On 27 January 2010, the Court met in private session to deliberate.

Presentation of the Facts and Statement of Arguments of the Parties

8. Mr Kurtiši provided to the Court a Decision of the Municipal Assembly of Prizren, dated 11 September 2008, signed by the Chair of the Assembly and the Mayor of the Assembly. That decision reads as follows: "We state that the Vice Chairman of the Communities in the Municipal Assembly of Prizren, in compliance with the provisions of the Law on Local Self Government, is Mr Ćemailj Kurtiši, a qualified lawyer." The same officers of the Municipal Assembly, in their reply to the referral, made no objection to the status of Mr Kurtiši arising out of his referral of the matter to the Constitutional Court. The Court is therefore satisfied that Mr Kurtiši has the proper legal standing and authority to bring this referral to the Constitutional Court.

9. Mr Kurtiši made his claim[3] as Deputy Chairperson for Communities of a Municipality, being a person authorized to refer acts or decisions of the Municipality that are alleged to be in violation of their rights to the Constitutional Court.
10. Articles 54 and 55 of the Law of Local Self Government state as follows:

[2] Pursuant to Article 22 of the Law of the Constitutional Court and Section 7 of the Rules of Procedure of the Constitutional Court

[3] Pursuant to Article 55.4 of the Law on Local Self Government, Law Nr. 03/L-040, in the event that the Municipality chooses not to review acts or decisions that violate the constitutionally guaranteed rights of Communities that have been referred to it by the Deputy Chairperson he or she may then submit the matter directly to the Constitutional Court.

Article 54

Deputy Chairperson for Communities

54.1. In municipalities where at least ten per cent (10%) of the citizens belong to Communities not in the majority in those municipalities, a post of the Chairperson of the Municipal Assembly for Communities shall be reserved for a representative of these communities.

54.2. The post of the Deputy Chairperson of the Municipal Assembly for Communities shall be held by the non-majority community's candidate who received the most votes on the open list of candidates for election to the Municipal Assembly.

Article 55

Duties of the Deputy Chairperson of a Municipality for Communities

55.1. The Deputy Chairperson of a Municipality for Communities shall promote inter- community dialogue and serve as formal focal point for addressing non-majority communities' concerns and interests in meetings of the Assembly and its work.

55.2. The Deputy Chairperson of a Municipality for Communities shall be responsible for reviewing claims by communities or their members that the acts or decisions of the municipal assembly violate their constitutionally guaranteed rights.

55.3. The Deputy Chairperson of a Municipality for Communities shall refer such matters to the Municipal Assembly for its reconsideration of the act or decision.

55.4. In the event the Municipal Assembly chooses not to reconsider its act or decision, or the Deputy Chairperson of a Municipality for Communities deems that even upon reconsideration the act or decision presents a violation of a constitutionally guaranteed right, the Deputy Chairperson of a Municipality for Communities may submit the matter directly to the Constitutional Court, which may decide whether to accept the matter for review.

11. On 15 October 2008, the Municipality of Prizren[4] delivered a Decision adopting the Municipal Statute. Article 7 of that Statute provides:

[4] Pursuant to Article 12.3 of the Law on Local Self Government, Law Nr. 03/L-040

Article 7

The Municipality has an emblem, flag and symbol.

The emblem of the Municipality is "The House of the League of Prizren" circled by the following wording "1878 – Prizren".

The use of Municipal symbols shall be further regulated by special decision of the Assembly.

12. The referral submitted by Mr Kurtiši states that the non-majority Communities proposed at the time that the wording "Komuna", "Opstina", "Belediye" be written within the circle of the emblem without the year "1878", thus signifying that several communities live in that Municipal area and that the Municipality is multiethnic. That proposal was not accepted. Furthermore, he maintains that the members of the Municipal Assembly from the majority community ignored the fact of the traditional presence of non-majority communities in the Municipality. Mr Kurtiši maintains that the provision and symbol of the League of Prizren glorifies the identity of only one community in Prizren Municipality. He states that the League of Prizren recognizes the cultural-historical significance of the Albanian community only and that the emblem carries no elements that signify the other communities who live in the Municipality. He maintains that the Municipal emblem should symbolise and transmit the message of co-existence of communities and community members and the presence of multi-ethnicity, multiculturalism, multi-religiousness and multilingualism. The emblem, he says, does not transmit a message or multi-ethnicity in the very multiethnic area that is the Municipality of Prizren.

13. Mr Kurtiši also maintained that, the symbol was not approved by a two-thirds (2/3) majority of the Assembly[5]. He states that only 24 out of 41 members of the Assembly voted for the adoption of the Decision in question. In fact, Article 7.4 provides as follows:

7.4. The symbols of a municipality may be approved or changed by two thirds (2/3) majority vote of the Municipal Assembly after extensive public consultation has taken place.

14. However, the reply of the Municipality stated that, on 15 October 2008, 29 members of the Assembly voted for the proposal and 5 voted against it. Notwithstanding this apparent conflict between Mr Kurtiši and the Municipality about the numbers voting for and against the adoption of

[5] Pursuant to Article 7.4 on the Law on Local Self Government, Law Nr. 03/L-040

the Decision on the Statute, the Court does not decide on grounds arising from an alleged irregularity in the voting procedure and, therefore, nothing is to be taken from this Judgment as either a finding in favour or against this part of the referral.

15. Mr Kurtiši, in the substantive body of his referral, sets out a number of different legal bases for the grounding of his referral. He says that Article 3 of the Constitution was violated. Article 3 states:

Article 3 [Equality Before the Law]

1. The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.

2. The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members.

16. Secondly, he states that Article 4.3 of the Law on Local Self Government was violated. Article 4.3 of that Law states as follows:

4.3. Municipalities shall implement their policies and practices to promote coexistence and peace between their citizens and to create appropriate conditions enabling all communities to express, preserve, and develop their national, ethnic, cultural, religious, and linguistic identities.

17. Continuing, he submits that Article1.1, 1.4 and 2.1 of the Law on The Protection and Promotion of the Rights of Communities and their Members in Kosovo[6] was violated. At this stage, it is relevant to quote Articles 1 and 2 of that Law in their entirety.

Article 1
General provisions

1.1 The Republic of Kosovo shall guarantee full and effective equality for all people of Kosovo. Kosovo regards its national, ethnic, linguistic and religious diversity as a source of strength and richness in the further development of a democratic society based on the rule of law. In

[6] Law No. 03/L-047

the development of the Republic of Kosovo, the active contributions of all persons belonging to communities is encouraged and cherished.
1.2 The Republic of Kosovo shall take special measures to ensure the full and effective equality of communities and their members, taking into consideration their specific needs. Such measures shall not be considered act of discrimination.

1.3 Persons belonging to communities in the Republic of Kosovo shall be entitled to enjoy individually or jointly with others the fundamental and human rights and freedoms established in international legal obligations binding upon the Republic of Kosovo. These rights and freedoms are guaranteed by the constitution, other laws, regulations and state policies.

1.4 For the purposes of this law, communities are defined as national, ethnic, cultural, linguistic or religious groups traditionally present in the Republic of Kosovo that are not in the majority. These groups are Serb, Turkish, Bosnian, Roma, Ashkali, Egyptian, Gorani and other communities. Members of the community in the majority in the Republic of Kosovo as a whole who are not in the majority in a given municipality shall also be entitled to enjoy the rights listed in this law.

1.5 Every person belonging to a community shall have the right to freely choose to be treated or not to be treated as such, and no disadvantage or discrimination shall result from the choice to exercise or not to exercise the rights that are connected with that choice.

1.6 In their free exercise of rights and freedoms enshrined in this law, communities and their members shall respect the rights of others.

1.7 The authorities in the Republic of Kosovo, including the Courts, shall interpret this law in accordance with the guarantees of human rights and fundamental freedoms and the rights of communities and their members established in the Constitution of the Republic of Kosovo with applicable international human rights obligations including the provisions of the Council of Europe Framework Convention for the Protection of National Minorities.

Article 2
Identity

2.1 Communities and their members shall have the right to freely maintain, express and develop their culture and identity, and to preserve and enhance the essential elements of their identity, namely

their religion, language, traditions and cultural heritage. In addition to the specific rights enumerated in this law, fundamental human rights shall be exercised freely and equally, including freedom of thought; of expression; of the media; of association and assembly; of religious belief and practice; and the right to manifest, in public or private, individually or in community with others, the cultural attributes of the respective community.

2.2 The Republic of Kosovo shall create appropriate conditions that enable communities and their members to freely maintain, express and develop their identities.

2.3 Measures intended to alter the proportions of the population in areas inhabited by persons belonging to communities to their disadvantage are prohibited. Kosovo shall protect persons belonging to communities from policies or practices aimed at, or having the effect of, assimilation against their will.

2.4 Persons belonging to communities have the right to have personal names recognized in their original form and in the script of their language as well as to revert to their original names if they have been changed. This includes the right to freely choose their given and family names and the names of their children, and the right to enter such names into public registries, personal identification and other official documents in their own language and script in accordance with the law.

18. Mr Kurtiši further maintains that, at the time of the adoption of the Statute, the Communities Committee was not enabled to review the Statute and Decision in the drafting phase, despite the fact that the Communities Committee members insisted on the necessity of their review. Thereby, he alleges, Article 53 of the Law on Local Self Government was violated. That Article states:

Article 53
Communities Committee

53.1. The membership of the Communities Committee shall include the members of the Municipal Assembly and community representatives. Any community living in the municipality shall be represented by at least one representative in the Communities Committee. The representatives of communities shall comprise the majority of the Communities Committee.

53.2.The Communities Committee shall be responsible to review

compliance of the municipal authorities with the applicable law and review all municipal policies, practices and activities related with the aim to ensure that rights and interests of the Communities are fully respected and shall recommend to the Municipal Assembly measures it considers appropriate to ensure the implementation of provisions related to the need of communities to promote, express, preserve and develop their ethnic, cultural, religious and linguistic identities, as well as to ensure adequate protection of the rights of communities within the municipality.

19. Finally, Mr Kurtiši states, in general terms that Articles 6, 58[7] and 59.1[8] of the Constitution were violated. No exposition of the reasons how these Articles violated the Constitution was presented to the Court.

20. The Municipality of Prizren disputes, in their reply, the entirety of the claim made by Mr Kurtiši. They maintain that the appropriate numbers required for the passing of the Statute of the Municipality voted in its favour. They state that, on 10 November 2008, the decision of the Assembly of Prizren was sent to the Ministry of Local Government Administration (MLGA) for a compulsory evaluation of legality.

21. They concede that, on 27 November 2008, MLGA recommended to the Municipal Assembly the reconsideration of Article 7 of the Statute. Following this they point out that, at a meeting of 20 February 2009, the Assembly approved the decision reconfirming Article 7 of the Statute. They also state that, on 16 March 2009, the MLGA delivered to the Municipal Assembly an opinion finding that "the abovementioned decision was issued in accordance with the legal procedures, i.e. with Article 7 of the Municipal Statute, and Article 7 4 of the Law on Local Self-government and in accordance with the request of MLGA minister for review of Article 7 of the Municipal Statute adopted on 15 10 2008". That opinion from the MLGA seems to indicate that all matters were properly addressed by the Municipality and that all was in order with the Statute of Prizren Municipality and that the original concerns of the MLGA were dealt with.

22. However, as early as 27 November 2008, it was brought to the attention of the Municipality that there was concern, at a very high level, about the adoption of Article 7 of the Municipal Statute. Important questions about the proper level of extensive public consultation and the

[7] Article 58 1. The Republic of Kosovo ensures appropriate conditions enabling communities, and their members to preserve, protect and develop their identities. The Government shall particularly support cultural initiatives from communities and their members, including through financial assistance.

[8] Article 59 (1) Members of communities shall have the right, individually or in community, to: (1) express, maintain and develop their culture and preserve the essential elements of their identity, namely their religion, language, traditions and culture;

obligations of the Municipality to take cognizance of such consultation were raised. The Municipality ought to have had serious concerns about how it would treat such consultations pursuant to its obligations under the Law in relation to the symbol of the Municipality, particularly, in light of the concerns raised by the Municipal Communities.

23. As regards Article 3.1 of the Constitution, the Municipality states that no violation has occurred because no Community has been favored over another Community. They do not address how the actions of the Municipality might have had an effect of exclusion of Communities in the Municipality of Prizren.

24. As regards Article 6 of the Constitution, they state that any violation under this Article does not apply because it applies only to the State Symbols of Kosovo. The implication is that Mr Kurtiši does not make a complaint about the State Symbol of Kosovo and therefore there cannot be a violation of Article 6.

25. As regards the other alleged breaches of Articles of the Constitution and the Law, the Municipality states that they "do not stand". They request that the referral of Mr Kurtiši be denied as ungrounded. They do not, in any substantial way, address the concerns about the breach of the rights of the Communities which are set out in the referral of Mr Kurtiši and which are summarised in the preceding paragraphs.

Reasoning and Justification

26. It is appropriate here to point out the powers and functions of this Court. The main provisions of Comprehensive Framework for Kosovo Status Settlement proposed constitutional, economic and security provisions, all of which were aimed at contributing to the development of a multiethnic, democratic and prosperous Kosovo. What was proposed for Kosovo was a multi-ethnic society, governing itself democratically and with full respect for the rule of law and the highest level of internationally recognized human rights and fundamental freedoms. As regards the rights of communities, the Settlement was to address key aspects to be protected, including culture, language, education and symbols.

27. The Assembly of Kosovo adopted the Constitution on 9 April 2008. It entered into force on 15 June 2008. The doctrine of the separation of powers[9] as to the exercise of judicial power is given effect by the Constitution[10] which clearly states that such power is exercised by the

[9] As expressed in Article 4 of the Constitution
[10] In Article 102

Courts. The remit of this Constitutional Court is to be the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution. It goes without saying that the Court is fully independent and must also be completely impartial when performing its functions. The Constitution[11] clearly sets out the Jurisdiction of the Constitutional Court. Certain bodies, including individuals, may refer matters to the Court or violations by public authorities of their rights and freedoms guaranteed by the Constitution[12]. Additional jurisdiction may also be determined by law.

28. It is up to the Court, as *"the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution*"[13], to assess whether Laws or Statutes are in conformity with the Constitution. Thus, it will make determinations on violations by public authorities of the individual rights and freedoms guaranteed by the Constitution, "*but only after exhaustion of all legal remedies provided by law*"[14]. That means that state organs and the Courts, when making their decisions, are obliged to act within the Constitutional framework. In order to comply with that obligation there are parties who are authorized to refer some matters to the Court[15]. On the other hand, "*Courts shall adjudicate based on the Constitution and the law"[16] and they "have the right to refer questions of constitutional compatibility of a law to the Constitutional Court*"[17], thereby having regard to the fundamental rights and freedoms enshrined in the Constitution.

29. The State organs "*will guarantee the rights of every citizen, civil freedoms and equality of all citizens before* **the law..."**[18] ***Article 3 of the Constitution states:***

Article 3 [Equality Before the Law]

1. The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.

2. The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law

[11] Article 113 and Article 62.4
[12] Including rights enshrined in the International Conventions enumerated in Article 22.
[13] Article 112 (1) of the Constitution
[14] Article 113 (7) of the Constitution
[15] Article 113 of the Constitution
[16] Article 102 (3) of the Constitution
[17] Article 113 (8) of the Constitution
[18] The Preamble of the Constitution

and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members.

30. *Throughout the Constitution there are references to the principals of equality and multi-ethnicity, for example, when describing the multi-ethnic character of the state symbols of Kosovo*[19]*, when dealing with basic values* [20]*, when dealing with equality before the law*[21]*, when dealing with equality before the courts*[22] *and many others.*

31. The Constitution is the basic law and it is the source of the fundamental rights and freedoms of the citizens and of the communities of Kosovo[23]. . These fundamental rights are *"indivisible, inalienable, and inviolable and are the basis of the legal order of the Republic of Kosovo."*[24] Furthermore, Chapter 3 sets out further "Rights of Communities and Their Members."[25] These further rights of Communities supplement, augment and are in addition to all other rights that are expressed in the Constitution.

32. Article 57.3 of the Constitution specifically gives Members of Communities *"...the right to freely express, foster and develop their identity and community attributes."* One of the ways that Communities "express, foster and develop their identity and community attributes" is by becoming involved in the political process, participating in deliberations on the adoption of the Statute of a Municipality and by making constructive suggestions about the form of the emblem that the Municipality chooses to adopt. Article 58.4 obliges the Republic of Kosovo to *"...adopt adequate measures as may be*

[19] In Article 6. 1. The flag, the seal and the anthem are the state symbols of the Republic of Kosovo all of which reflect its multi-ethnic character.

[20] In Article 7 1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy. 2. The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life.

[21] In Article 24 1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination. 2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status. 3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.

[22] In Article 31.1 Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

[23] Fundamental Rights are dealt with in Chapter 2 of the Constitution, which comprises Articles 21 through Article 56

[24] As expressed in Article 21.1 of the Constitution

[25] Chapter 3, in Article 57 through Article 62

necessary to promote, in all areas of economic, social, political and cultural life, full and effective equality among members of communities." This obligation extends to the Municipality of Prizren as an emanation of the State having constitutional recognition as one of the basic units of local government. Article 124.1 obliges the Municipality of Prizren, and all Municipalities, *"...to encourage and ensure the active participation of all citizens in the decision-making process of the municipal bodies."*

33. Furthermore, Article 22 of the Constitution incorporated into the constitutional law of Kosovo, and makes directly applicable, a further substantial body of human rights and fundamental freedoms. This Article provides:

Article 22
[Direct Applicability of International Agreements and Instruments]

Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

(1) Universal Declaration of Human Rights;

(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;

(3) International Covenant on Civil and Political Rights and its Protocols;

(4) Council of Europe Framework Convention for the Protection of National Minorities;

(5) Convention on the Elimination of All Forms of Racial Discrimination;

(6) Convention on the Elimination of All Forms of Discrimination Against Women;

(7) Convention on the Rights of the Child;

(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;

34. These Conventions therefore have direct applicability in Kosovo and they have priority over provisions of laws and other acts of public institutions.

The Decisions which emanate from the courts that adjudicate on these Conventions, principally the European Court of Human Rights sitting in Strasburg, aid and assist not only all the Courts of Kosovo but other State organs as to how fundamental rights and freedoms must be interpreted and applied in Kosovo.

35. Apart from the Chapter 2 "Fundamental Rights and Freedoms" and the Chapter 3 "Rights of Communities and Their Members" there are two Laws which are of assistance to this Court in coming to its Judgment in this case. They are the Law on the Use of Languages[26] and the Law on the Protection and Promotion of the Rights of Communities and Their Members in Kosovo[27]

36. The purpose of Law on the Use of Languages, as stated in clear terms, gives special recognition to the languages of Communities. This is so even at the Municipal level which authorises Community languages in official use under conditions specified in the law. The full text of Article 1 provides:

Law on the Use of Languages

Article 1

1.1. The purpose of this law is to ensure:

i. The use of the official languages, as well as languages of communities whose mother tongue is not an official language, in Kosovo institutions and other organizations and enterprises who carry out public functions and services;

ii. The equal status of Albanian and Serbian as official languages of Kosovo and the equal rights as to their use in all Kosovo institutions;

iii. The right of all communities in Kosovo to preserve, maintain and promote their linguistic identity;

iv. The multilingual character of Kosovo society, which represents its unique spiritual, intellectual, historical and cultural values.

1.2. At the Municipal level, other community languages, such as Turkish, Bosnian and Roma will be languages in official use under

[26] Law No. 02/L-37 adopted by the Assembly of Kosovo on 27 July 2006
[27] Law No. 03/-047 adopted by the Assembly of Kosovo on 13 March 2008.

conditions specified in this Law.

37. The Court gives particular recognition of the wording, used in Article 1.1.iii, *"The right of all communities in Kosovo to preserve, maintain and promote their linguistic identity."* By using these words the legislator chose to give a particular right to Communities to promote their linguistic identity. The question must be posed as to whether the Municipality of Prizren when it made the decision to adopt Article 7 of its Statute had any or any proper, regard to that right. This is particularly so because of the special position that the Law confers on Communities in Kosovo.

38. The Law on the Protection and Promotion of the Rights of Communities and Their Members in Kosovo was adopted by the Assembly of Kosovo on 13 March 2008. The General Provisions in Article 1 and the rights in relation to identity in Article 2 are strong and robust expressions of the will of the Assembly of the Republic of Kosovo to protect and promote rights of Communities and their members as citizens of Kosovo. The obligations on the Republic of Kosovo to recognize the rights contained in this law do not apply only to the Government and the Ministries established by Law. They not only apply to all the state organs and but also to the Municipalities.

39. The Municipalities are the basic unit of local government in the Republic of Kosovo. In fact, Article 124.1 of the Constitution states: "*1. The basic unit of local government in the Republic of Kosovo is the municipality. Municipalities enjoy a high degree of local self-governance and encourage and ensure the active participation of all citizens in the decision-making process of the municipal bodies."* The Municipalities therefore have special recognition at the constitutional level with the attendant rights and obligations under the constitutional framework. These obligations include the obligation to act in a constitutional manner in relation to the fundamental rights and freedoms granted by the Constitution and the Law. Having given these rights to the Communities and their members and bearing in mind the obligations of all public bodies to act in a lawful and constitutional manner, a further question must be asked: whether the Municipality of Prizren had regard, or any proper regard, to these rights when it made the decision to proceed to adopt Article 7 of its Statute.

40. The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, as earlier stated, were incorporated into the law of Kosovo at the Constitutional level, it being given priority over provisions of laws and other acts of public institutions. This Court must interpret the Constitution and the Convention in a complementary manner bearing in mind the necessity to

protect the fundamental rights and freedoms enumerated in both. Many of the countries of Europe which emerged from totalitarian rule over the last number of years have adopted European standards for the protection of human rights. Kosovo has done the same. The constitutional system is one, like others, based on the pillars of democracy, human rights and the rule of law.

41. The Framework Convention for the Protection of National Minorities is also part of the domestic law of Kosovo being one of the international agreements and instruments referred to in Article 122. Articles 1 to 6 of the Framework Convention give power expression to the ideals underpinning the reasons why Communities ought to be given special protection. They state:

Article 1

The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.

Article 2

The provisions of this framework Convention shall be applied in good faith, in a spirit of understanding and tolerance and in conformity with the principles of good neighbourliness, friendly relations and co-operation between States.

Article 3

1 Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.

2 Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others.

Article 4

1 The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.

2 The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

3 The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.

Article 5

1 The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.

2 Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.

Article 6

1 The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

2 The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

42. The Law on the Use of Languages and the Law on the Protection and Promotion of the Rights of Communities and Their Members in Kosovo, to a large extent, gave concrete effect to the Framework Convention. The Court will interpret the actions of the Municipality of Prizren in light of the Constitution, the International Conventions incorporated into the law of Kosovo, the case law from the European Court of Human Rights and these Laws.

43. Prizren is located in the South of Kosovo and because of its geographical location it is an important commercial and business centre. It has a long history and tradition of ethnic diversity. It is culturally rich, not least because of the diversity and the ethnic heterogeneity of its population. It has a long tradition of co-operation and tolerance among its different communities. The Municipality of Prizren has members from many of its different Communities and the Applicant, Mr Kurtiši, is the Deputy Chairperson for Communities of the Municipality.

44. The particular complaint in this case is in relation to the symbol of the Municipality of Prizren. Symbols are closely related to the fostering and preservation of tradition, culture, distinctive characteristics of every people and they have an influence on assembling and joining in one idea and one belief. It is beyond any doubt that symbols convey certain emotions and meaning which are experienced in a specific way by those who recognize their history, tradition and culture in those symbols. The symbols are not pure images and decorations but each of them carries certain deeper and hidden meaning.

45. The emblem represents in many ways the achievements, hope and ideals of all citizens of a country or of a region of the country. As such the emblem ought to have respect for all citizens, that is, in the instant case, the citizens of the Municipality as "a basic territorial unit of local self-governance in the Republic of Kosovo"[28]. In order to make it possible for the citizens of Prizren to see it and feel it in that way, the emblem of the Municipality ought to be a symbol of all the citizens.

46. It is not the local symbol of only one Community that should be reflected in the tradition and historical heritage of that people but the official symbol ought to reflect the multi-ethnic nature of the Municipality. This Court is aware that Albanians identify with the "1878" portrayed on the emblem of the Municipality of Prizren, as described in Article 7 of the Statute of the Municipality. 1878 was the year of the founding of the League of Prizren. Albanian leaders gathered in Prizren on 10 June of that year seeking to achieve an autonomous Albanian state. No one in Prizren could doubt that the inclusion of "1878" sought to favour the Albanian Community to the exclusion of the non-majority Communities. The Court considers that the other Communities in the Prizren Municipality have the legitimate right to preserve their tradition, culture and identity through the Emblem. When the Municipality decided to proceed with the emblem promoting the Albanian heritage and tradition without regard to the other Communities it infringed their statutory and constitutional rights.

[28] Article 12 (1) of the Constitution

47. The Constitutional Court reiterates that the right of Communities to freely express, foster and develop their identity and community attributes belongs to all Communities in Kosovo. Indeed, both Albanian and other communities should be equally able to preserve their tradition, culture and identity through their respective symbols. Proper protection of such Community rights undoubtedly and inherently necessitate a concerted, coherent and sustained action by public authorities aimed at providing equal opportunities and a range of cultural, linguistic and other rights for all Communities.[29]

48. Moreover, the Framework Convention for the Protection on National Minorities, provides that "*a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a minority, but also create appropriate conditions enabling them to express, preserve and develop this identity."*[30]

49. In this connection, the Court also recalls that the Constitution establishes that "The Republic of Kosovo is *a multi-ethnic society consisting of Albanian and other Communities*"[31] and equally guarantees the right of communities to use and display Community symbols, in accordance with the law and international standards. The Constitution[32] further spells out the State's responsibility to ensure appropriate conditions enabling Communities and their members to preserve, protect and develop their identities; it also emphasises the responsibility of the State to promote a spirit of tolerance and dialogue, and to support reconciliation among communities.

50. The Constitutional Court, therefore, has to consider to what extent Article 7 of the Municipal Statute of Prizren complies with these standards by creating appropriate conditions enabling all communities to preserve their identity under a common symbol, i.e. the emblem of the Municipality of Prizren.

51. It appears, however, that the Albanian Community has been put in a privileged position only because this community has a distinct majority in the Assembly and a dominant position in the Municipality. The Court considers that the Municipal Assembly of Prizren did not address properly the legitimate concerns expressed by the Applicant. Indeed, the Applicant maintains that the members of the Municipal Assembly from

[29] See e.g. Venice Commission Report on Non-Citizens and Minority Rights Adopted by the Venice Commission at its 69th plenary session (Venice, 15-16 December 2006)
[30] See Preamble of the Framework Convention for the Protection of National Minorities
[31] See Art. 3 of the Constitution
[32] See Article 58

the majority community ignored the traditional presence of non-majority Communities in the Municipality.[33]

52. The Constitutional Court considers that a prerequisite for a pluralist and genuinely democratic multiethnic society, be it a country, region, municipality or other territorial unit, is non-majority Community participation in the political, social, economic and cultural life[34] in order to develop a sense of belonging to and having a stake in that society. Such participation cannot be achieved if the common symbol of that society does not represent the rights of all communities, but, instead, ignores the rights of non-majority Communities.

53. Consequently, the emblem of Prizren Municipality, constituting the most powerful expression of the identity of all communities, should portray the symbol of a multiethnic society, representing majority and non-majority communities, and should promote a spirit of tolerance, dialogue and reconciliation among communities.

54. The Court recalls the proposal of the non-majority Communities in Prizren that the wording "Komuna", "Opstina", "Belediye" be written within the circle of the emblem of the Municipality without the year "1878". The Court is of the view that this was a reasonable proposal that would have met the legitimate concerns of the Communities.

55. Accordingly, the Court finds that the Municipal Assembly, when making the decision on adopting Article 7 of its Statute, imposed an emblem which cannot be considered as a common symbol of all Prizren communities, and outweighed the identity of the ethnic Albanian Community over the identity of other Communities in Prizren. Thereby, the Court finds that the Municipal Assembly violated the Constitution.

56. Bearing all this in mind, having considered all the facts and the law in the present case, the obligations of Municipality to have regard to the rights of non-majority Communities, the Articles of the Constitution previously referred to the International Conventions and the relevant case law from the ECHR, the Court concludes that the Municipality of Prizren did not have any or any proper regard to the fundamental rights and freedoms granted by the Constitution when dealing with the right of the non-majority Communities to preserve, maintain and promote their identity.

[33] See Para 12 of the Judgment
[34] Cf. Article 15 of the Framework Convention for the Protection of National Minorities

HOLDING

57. For these reasons the Court gives Judgment unanimously, with a concurrent opinion of Judge Rodrigues, as follows;

I. **Decides** that the referral is admissible;

II. **Finds** that there has been a violation of the rights of the non-majority Communities in Prizren to preserve, maintain and promote their identity;

III. **Decides** that Article 7 of the Statute of the Municipality of Prizren is incompatible with the Constitution of the Republic of Kosovo, in particular Articles 3, Article 7.1, Article 58 and Article 59;

IV. **Orders** the Municipality of Prizren to amend its Statute and its emblem within the period of three months from the delivery of this Judgment in order to bring them into conformity with the Constitution and to not exclude the non-majority Communities;

V. **Requires** the Municipality of Prizren to report to the Court on progress in relation to compliance with that Order prior to the expiry of the period of three months from the delivery of this Judgment and

VI. **Remains seized** of the matter pending compliance with that Order.

This Judgment shall have effect immediately on delivery to the parties.

Done at Pristina this day of March 2010.

Judge Rapporteur	**President of the Court**
Judge Almiro Rodrigues, signed	Prof. Dr. Enver Hasani, signed

Mehdi Krasniqi vs. Decision no. 5000956 of the Ministry of Labour and Social Welfare

Case KI 12/09, Decision of 24 March 2010
Keywords: individual referral, invalidity pension, withdrawal of referral by the applicant.

The applicant filed a referral claiming that his right to invalidity pension was violated by the decision of the Ministry of Labour and Social Welfare, which rejected applicant's right to invalidity pension. The applicant made use of the available legal remedies, by filing complaint against the challenged decision with the Ministry of Labour and Social Welfare.

In the meantime, since the applicant informed the Constitutional Court that he regained his rights claimed in the proceedings with the Ministry of Labour and Social Welfare, the Constitutional Court decided to remove the referral from the list, thereby reasoning that there are no outstanding circumstances related to respect of human rights, which would require further examination of the referral, despite withdrawal of the applicant.

Pristina, 24 March 2010
Ref. No.: TK 10/10

DECISION TO STRIKE OUT THE REFERRAL

Case No. KI 12/09
Mehdi Krasniqi
vs.
Ministry of Labour and Social Welfare

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Snezhana Botusharova, Judge
Robert Carolan, Judge
Ivan Čukalović, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjylieta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

Applicant

1. The Applicant, Mehdi Krasniqi, is residing in Pristina.

Subject matter

2. The Applicant filed the Referral with the Constitutional Court on 16 March 2009. In his Referral he complains that his right to a disability pension has been violated.

Legal basis

3. Article 113 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Articles 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law), and Section 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Summary of facts

4. The Applicant filed a request for a disability pension to the Ministry of Labour and Social Welfare on 15 June 2007.

5. The Ministry of Labour and Social Welfare rejected the Applicant's request by its Decision No 5000956. The Applicant appealed against that Decision within the prescribed time limit of 14 days.

6. On 15 November 2007 the Appeals Committee, acting as the second instance body, rejected the Applicant's appeal. The Appeals Committee argued the Applicant failed to submit relevant evidence to substantiate his appeal and consequently his appeal was rejected as unfounded.

7. However, on 15 May 2009, the Applicant's request for a disability pension was granted by the Ministry of Labour and Social Welfare.

Summary of the proceedings before the Constitutional Court

8. The Applicant submitted his Referral to the Constitutional Court on 16 March 2009.

9. On 23 December 2009 the Applicant informed the Constitutional Court that his request for a disability pension had been granted by the Ministry of Labour and Social Welfare. He attached to his written submission a copy of the Decision of 15 May 2009 issued by the Ministry of Labour and Social Welfare and informed the Court that his claim had been satisfied.

The Court's Assessment

10. In order to be able to decide on the Applicant's request the Constitutional Court needs first to examine, whether the conditions prescribed in Section 32 of the Rules of Procedure have been satisfied.

11. Section 32 of the Rules of Procedure, in the pertinent part, reads as follows:

"Withdrawal of Referral

(1) A party which has filed a referral may withdraw the referral any time before the beginning of a hearing on such referral.

(2) Irrespective of a withdrawal pursuant to paragraph (1), the Court may determine to decide on the referral. In such event, the Court shall decide without a hearing on the basis of the referral and a reply, if any, and any documents attached thereto..."

12. On 18 February 2010, in the light of the above developments, the Judge Rapporteur, Ilirana Islami, recommended to the Review Panel, composed of Judges Robert Carolan (Presiding Judge), Snezhana Botusharova and Ivan Čukalović, to discontinue further examination of the Referral. After having heard the Judge Rapporteur, the Review Panel agreed that there are no special circumstances regarding respect for human rights which would require further examination of the Referral and forwarded its Recommendation to the Court on the same date.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law and Section 32 of the Rules of Procedure, unanimously,

DECIDES

I. TO STRIKE OUT the Referral.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Prof.Dr. Iliriana Islami, signed	Prof. Dr. Enver Hasani, signed

Rafet Hoxha vs. Decision Pn. No. 168/05 of the Supreme Court

Case KI 27/09, decision of 24 March 2010
Keywords: Individual referral, extradition, withdrawal of referral.

The applicant filed a referral claiming that his constitutional rights were violated by a decision of the Supreme Court of Kosovo, which found the agreement on extradition of the applicant to Norwegian authorities to be valid. The applicant claimed that his rights guaranteed by the Constitution were violated. After filing the referral, the applicant informed the Court that he did not want to continue the proceeding related to his referral.

The Constitutional Court, as per its Rules of Procedure, decided to remove the referral from the list, thereby reasoning that there are no outstanding circumstances related to respect of human rights, which would require further examination of the referral, despite withdrawal of the applicant.

Pristina, 24 March 2010
Ref. No.: TK 11/10

DECISION TO STRIKE OUT THE REFERRAL

Case No. KI 27/09
Rafet Hoxha
vs.
Supreme Court Decision No. Pn. nr 168/2005

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
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Rafet Hoxha, represented by Mr Hamdi Podvorica, a practicing lawyer in Pristina.

Subject matter

2. The Applicant filed the Referral with the Constitutional Court on 13 July 2009. In his Referral the Applicant complains that his rights under the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution) had been violated by Decision No Pr. 168/2005 of the Supreme Court of 7 July 2005 (hereinafter referred to as: the Supreme Court Decision).

Legal basis

3. Article 113 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Articles 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law), and Section 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Summary of facts

4. The Supreme Court Decision confirmed Decision Kp. Nr 120/2005 of the District Court of Pristina which concluded that all legal preconditions for the extradition of the Applicant to Norway, laid down in the Agreement of 22 October 2004 concluded between UNMIK and the Government of the Kingdom of Norway had been fulfilled.

5. The aforementioned Agreement concluded between the United Nations Mission in Kosovo (hereinafter referred to as: UNMIK) and the Kingdom of Norway, stipulates the surrender of the Applicant to the Kingdom of Norway, since the Norwegian authorities have initiated criminal proceedings against the Applicant for the criminal offence of murder which was allegedly committed on 31 March 2003.

Summary of the proceedings before the Court

6. The Applicant submitted his Referral to the Constitutional Court on 30 July 2009. In his Referral the Applicant complains that his rights under the Constitution have been violated by Decision No. Pn. Nr. 168/2005 of the Supreme Court of 7 July 2005.

7. On 13 October 2009, the Applicant supplemented the Referral with a request for interim measures, requesting the suspension of the procedure for his transfer to Norway, until the Constitutional Court would issue its final Decision.

8. On 15 December 2009 the Constitutional Court decided, without prejudging the final outcome of the Referral, to reject the Applicant's request for interim measures.

9. By letter dated 28 December 2009, the Applicant's representative informed the Court that the Applicant did not wish to pursue his Referral.

The Court's Assessment

10. In order to be able to decide on the Applicant's request to discontinue the Applicant's case the Constitutional Court needs first to examine, whether the conditions prescribed in Section 32 of the Rules of Procedure have been satisfied.

11. Section 32 of the Rules of Procedure, in the pertinent part, reads as follows:

"Withdrawal of Referral

(1) A party which has filed a referral may withdraw the referral any time before the beginning of a hearing on such referral.

(2) Irrespective of a withdrawal pursuant to paragraph (1), the Court may determine to decide on the referral. In such event, the Court shall decide without a hearing on the basis of the referral and a reply, if any, and any documents attached thereto..."

12. On 18 February 2010, in the light of the above developments, the Judge Rapporteur, Ivan Čukalović, recommended to the Review Panel, composed of Judges Robert Carolan (Presiding), Snezhana Botusharova and Altay Suroy, to discontinue further examination of the Referral. After having heard the Judge Rapporteur, the Review Panel agreed that there are no special circumstances regarding respect for human rights which would require further examination of the Referral and forwarded its Recommendation to the Court on the same date.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law and Section 32 of the Rules of Procedure, unanimously,

DECIDES

I.TO STRIKE OUT the Referral.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Prof..Dr. Ivan Čukalović, signed	Prof. Dr. Enver Hasani, signed

Ahmet Ismail Rexhepi vs. Kosovo Police and Municipal Public Prosecutor's Office in Pristina

Case KI 05/09, decision of 20 April 2010
Keywords: individual referral, prohibition of torture, cruel, inhuman and humiliating treatment

The Applicant filed a referral alleging that due to the lack of adequate actions by the Kosovo Police and Municipal Public Prosecutor's Office in Pristina in criminal prosecution of persons who assaulted and beat his minor son, although these persons were known to the Police, his constitutional rights, such as prohibition of torture, cruel, inhuman and humiliating treatment were violated.

The Constitutional Court decided to reject the applicant's referral as inadmissible, thereby reasoning that the Applicant had not raised such an issue during the preliminary proceedings, and according to the findings of the Court, authorities had made their best efforts and pursued relevant procedures in identifying the criminal offence, and bringing perpetrators to justice.

Pristina: 20 April 2010
Ref. no.: RK 12 /10

RESOLUTION ON INADMISSIBILITY

Case No. KI. 05/09,
Ahmet Ismail Rexhepi
vs.
Kosovo Police and
The Municipal Public Prosecutor Office Pristina

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Kadri Kryeziu, Vice-president
Snezhana Botusharova, Judge
Robert Carolan, Judge
Ivan Čukalović, Judge
Iliriana Islami, Judge
Gjylieta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

Applicant

1. The Applicant, Ahmet Ismail Rexhepi, is residing in Pristina.

Responding Party

2. The Responding parties are Kosovo Police ad the Office of Public Prosecutor Kosovo.

Subject matter

3. The Applicant complains that his rights guaranteed by Article 27 of the Constitution (Prohibition of Torture, Cruel, Inhuman and Degrading Treatment) have been violated. The applicant argues that there was a lack adequate action of Kosovo Police and the Municipal Public Prosecutor Office in Pristina in founding and prosecuting persons who attacked and beaten his son on 30 October 2006. According to the medical reports, at that time his son was still a minor having been born on 11 November 1991.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article 20 of 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).

Summary of the proceedings before the Court

5. The Applicant submitted his Referral to the Constitutional Court on 24 February 2009. On 27 February 2009 the Applicant was informed by the Provisional Secretariat of the Constitutional Court that his case would be considered once the Court becomes fully functional.

6. On 23 December 2009 the Reporting judge communicated the case to the Respondent Parties. They replied to the Court a day after this communication.

7. On 18 February 2010, after having considered the Report of the Reporting Judge, Kadri Kryeziu, the Review Panel, composed of Judges Ivan Čukalović (Presiding), Enver Hasani and Iliriana Islami recommended to the full Court to reject the case as inadmissible.

Facts

8. It appears from the documents submitted by the Applicant that, on 30 October 2006, certain individuals (who according to the applicant's allegations are- well known to the police) beat the Applicant's minor son. According to the copies of medical findings the Applicant son suffered from, inter alia, *Cefalea* (i.e. headache in English) and *Stres ulcus vomitus*.

9. A day after the attack the Applicant together with his son went to the police to provide them with additional information regarding the case. However, the Applicant did not receive any further information.

10. On 13 November 2006 the Applicant submitted his complaint to the Ombudsperson Office in Kosovo. The Ombudsperson Office communicated the case to the Deputy Police Commissioner on 2 April 2007.

11. The Applicant alleges that up to recent times he has visited the Police station at least 9 times, the Public Prosecutor Office at least 3 times but, he alleges, without any success. The Applicant submitted his complaints also to the EULEX police and the Kosovo Judicial Council of Kosovo.

12. However, it appears that until now the Police have not identified persons who attacked the Applicant's son and consequently no one has been prosecuted yet.

Applicant's allegations

13. The Applicant complains that his rights guaranteed by Article 27 of the Constitution (Prohibition of Torture, Cruel, Inhuman and Degrading Treatment) have been violated

Comments by the Responding Parties

14. On 24 December 2009 the Municipal Public Prosecutor replied to the Constitutional Court. According to the Prosecutor they communicated on this case several times (i.e. on 8 May 2005, 5 February 2008 and 18 March 2009) with the Police. The Public Prosecutor further alleges that in order to find the individuals who attacked the Applicant's son they took a statement from a witness identified by the Applicant. However, this witness did not identify the persons who attacked the Applicant's son.

15. Furthermore in its reply to the Court, General Director of Kosovo Police states that the police took all necessary investigative actions and interviewed victim and witness. However, the Police did not have enough evidence and facts to identify the suspects. Consequently on 27 April 2007 the case was sent to the Public Prosecutor against "unknown perpetrators".

Assessment of the Admissibility of the Referral

16. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution.

17. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

    "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";

and to Article 47.2 of the Law, stipulating that:

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

18. As indicated in Case No. KI.41/09, AAB-RIINVEST University vs. the Government of the Republic of Kosovo (Resolution Nr. RK-04/10 of the Constitutional Court of the Republic of Kosovo, dated 27 January 2010), the Court wishes to emphasize that the rationale for the exhaustion rule, as interpreted by the European Court of Human of Rights (see Article 53 of the Constitution), 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. This is an important aspect of the subsidiary character of the Constitution. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). 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 is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).

19. It appears from the Applicant's allegations and from the Respondent Parties reply that the Applicant case is still pending.

20. Even assuming that the Court would extend its authority to hear the Applicant's Referral on the theory that the Applicant's exhausted all available remedies, it seems that the Referral must be rejected for the following reasons.

21. Taking into account the allegations stated in the Referral, an issue may arise as to weather the suffering imposed upon the Applicant may be considered torture, inhuman or degrading treatment or punishment for the reason that no progress has been made in the relevant investigation 4 years after the attack of the Applicant's son.

22. The Court recalls that Article 27 of the Constitution is identical to Article 3 of the European Convention on Human Rights which reads:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

23. It is well established that Article 3 of the European Convention enshrines one of the fundamental values of democratic society. This implies one of the "absolute rights" of the European Convention and the states can never depart from compliance with it even in times of war.

24. Taking into account the replies of the Respondent Parties the Constitutional Court is of the view that the authorities used their best endeavors and followed all relevant procedures to establish the identity of the perpetrators and to bring them to justice.

26. Furthermore, the Applicant, as the father of then minor who was the victim of the attack, had not submitted any *prima facie* evidence indicating a violation of his rights under Article 27 of the Constitution and Article 3 of the Convention (see Vanek v. Slovak Republic, Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005). It follows that this complaint is ill-founded and must be rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Article 55 of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT the Referral as inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official

III.Gazette, in accordance with Article 20.4 of the Law.

IV.This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Mr. Sc. Kadri Kryeziu, signed	Prof. dr. Enver Hasani, signed

Ahmet Arifaj vs. Decision no. 01 No. 351-3187-08 of the Municipality of Klina

Case KI 23/09, decision of 20 April 2010
Keywords: individual referral, right to compensation of property, non-exhaustion of legal remedies.

The applicant filed a referral alleging that the Municipal Assembly of Klina issued an unfavourable decision for compensation of property damaged during 1998 and 1999, thereby rejecting applicant's request for reconstruction of the house. He alleges that his right to compensation of property destroyed during the war was violated, without clarifying the specific provisions of the Constitution claimed to have been violated.

The Constitutional Court decided to reject the referral as inadmissible, thereby reasoning that applicant may not be considered to have met requirements as per Article 113.7 of the Constitution, which provides that "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".

Pristina, 20 April 2010
Ref. no.: RK14 /10

RESOLUTION

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

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Kadri Kryeziu, Vice-President
Snezhana Botusharova, Judge
Robert Carolan, Judge
Ivan Čukalović, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjylieta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

Applicant

1. The Applicant, Ahmet Arifaj, is residing in Klina.

Responding Party

2. The Responding Party is the Municipality of Klina.

Subject matter

3. The Applicant complains that the Municipal Assembly of Klina issued an unfavorable decision for the compensation of property destroyed during the years 1998/99 in Kosovo.

Legal basis

4. Article. 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article 20 of 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).

Summary of the proceedings before the Constitutional Court

5. The Applicant submitted his Referral to the Constitutional Court on 30 June 2009. On 18 February 2010, after having considered the Report of the Reporting Judge, Kadri Kryeziu, the Review Panel, composed of Judges Enver Hasani (Presiding), Gjylieta Mushkolaj and Iliriana Islami, forwarded its recommendation to the full Court to reject the case as inadmissible on the same day.

Facts

6. It appears from the documents submitted by the Applicant, that, on 22 September 2009, the Municipal Assembly of Klina rendered the decision Nr 01NR 351-3187-08 to reject the request of the Applicant for providing support to rebuild his house due to the lack of budgetary means.

7. The Applicant has not in any way challenged the decision issued by the Municipal Assembly of Klina. Instead he approached several institutions, such as the Ombudsperson Office in Kosovo, and asked them to exert pressure on Municipality Assembly of Klina to assist him to rebuild the house destroyed during the war.

Applicant's allegations

8. The Applicant complains that his right to compensation for the property destroyed during the war has been violated without specifying any particular provision of the Constitution.

Comments by the Responding Party

9. The Responding Party, the Municipal Assembly of Klina to which the Referral was communicated by the Court's Registry Office, replied to the Constitutional Court on 5 January 2010. In that reply the Mayor of Klina stated as follows "With regard to the specific case file the issue of post-war emergency rebuilding was mainly dealt with by non-governmental organizations of various states, which had their own budgets and also had the parties' request and other materials for rebuilding houses. Therefore, we as a municipality had no access or the possibility of preparing priority lists for the beneficiaries."

Assessment of the Admissibility of the Referral

10. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution.

11. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

    "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";

and to Article 47.2 of the Law, stipulating that:

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

12. The Constitutional Court notes, however, that in his Referral, the Applicant has not submitted any evidence whatsoever, that he challenged decision issued on 22 September 2009 by the Municipal Assembly of Klina under No. Nr 01NR 351-3187-08.

13. As indicated in Case No. KI.41/09, AAB-RIINVEST University vs. the Government of the Republic of Kosovo (Resolution Nr. RK-04/10 of the Constitutional Court of the Republic of Kosovo, dated 27 January 2010), the Court wishes to emphasize that the rationale for the exhaustion rule,

as interpreted by the European Court of Human of Rights (see Article 53 of the Constitution), 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. This is an important aspect of the subsidiary character of the Constitution. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). 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 is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).

14. In this connection, the Constitutional Court would like to stress that applicants are only required to exhaust remedies that are available and effective. Discretionary or extraordinary remedies need not to be exhausted, for example requesting a court to revise its decision (see, mutatis mutandis, ECHR, Cinar v. Turkey, no 28602/95, decision of 13 November 2003). Where an applicant has tried a remedy that the Court considers inappropriate, the time taken to do so will not interrupt the running of the four-month time limit (Art. 49 “Deadlines” of the Law), which may lead to the complaint being rejected as out of time (see, mutatis mutandis, ECHR, Prystavka, Rezgui v. France, no 49859/99, decision of 7 November 2000).

15. As to the present case, the Applicant submitted his constitutional complaint directly to this Court, arguing that his right to the compensation for the destroyed property had been violated, without invoking any Article of the Constitution or of the European Convention of Human Rights and Fundamental Freedoms.

16. Furthermore, Law No. 02/L-28 on the Administrative Procedure of 22 July 2005, in its Section IX, provides that “Any interested party has a right to appeal against an administrative act or against an unlawful refusal to issue an administrative act” (Article 127.2), while “The administrative body, the appeal is addressed to, shall review the legality and consistency of the challenged act” (Article 127.3). Moreover, the Law provides that “The interested parties may address the court only after they have exhausted all the administrative remedies of appeal” (Article 127.4).

17. However, in his submissions, the Applicant has not substantiated in whatever manner, why he considers that the legal remedies, mentioned in Law No. 02/L-28 on the Administrative Procedure, including an

appeal to the regular courts, would not be available and, if available, would not be effective and, therefore, not need to be exhausted.

18. In these circumstances, the Applicant cannot be considered to have fulfilled the requirements under Article 113.7 of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Article 55 of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT the Referral as inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Mr.Sc.Kadri Kryeziu, signed	Prof. dr. Enver Hasani, signed

Emrush Kastrati vs. the Decision Pkl. no. 120/08 of the Supreme Court

Case KI 68/09, decision of 21 June 2010
Keywords: individual referral, interim measures, judicial and prosecutorial immunity.

The applicant filed a referral requesting the Court to grant interim measure against implementation of the decision of the Supreme Court approving the request for protection of legality against decisions of lower instance courts on quashing the charges filed against the applicant by the Municipal Public Prosecutor's Office of Prizren for issuing an illegal court decision. The applicant alleges that such a decision violated the independence of the judiciary, therefore violating the Article 107.1 of the Constitution, which guarantees judicial and prosecutorial immunity.

The Constitutional Court decided to reject applicant's referral for interim measures, thereby reasoning that he had not submitted any convincing argument to justify the stopping of criminal proceeding not to take place at the Municipal Court. Also, the Court decided that the applicant failed to prove that imposing an interim measure is necessary to avoid any irrecoverable damage, or that such measure is in the public interest

Pristina, 29 April 2010
Ref. No.: RK 16/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 68/09
Emrush Kastrati
vs.
Decision of the Supreme Court of Kosovo,
Pkl. No. 120/08, dated 1 September 2009

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

Having issued a Decision on 21 April 2010 refusing a request for interim measures of the Applicant, Emrush Kastrati, the Court unanimously adopts the following **Resolution**:

Introduction

The Applicant

1. The Applicant is Emrush Kastrati, a Judge of the Municipal Court in Malisheva.

The Challenged Decision

2. The Decision challenged by the Applicant is a Decision of the Supreme Court of Kosovo, Pkl. No. 120/08, and dated 1 September 2009.

Subject Matter

3. On 3 December 2009 the Applicant, Emrush Kastrati, lodged a referral to the Constitutional Court of the Republic of Kosovo requesting Interim Measures against the implementation of the Decision of the Supreme Court of Kosovo Pkl. No. 120/08, dated 1 September 2009 on the basis that the Supreme Court had undermined the independence of the judiciary in reaching its decision.

4. The Applicant pleaded that the Decision violates Article 107.1 of the Constitution of Kosovo which provides for judicial and prosecutorial immunity. Article 107, in full, states as follows:

Article 107 [Immunity]

1. *Judges, including lay-judges, shall be immune from prosecution, civil lawsuit and dismissal for actions taken, decisions made or opinions expressed that are within the scope of their responsibilities as judges.*

2. *Judges, including lay-judges, shall not enjoy immunity and may be removed from office if they have committed an intentional violation of the law.*

3. *When a judge is indicted or arrested, notice must be given to the Kosovo Judicial Council without delay.*

Legal Basis

5. Article. 116.2 and 113.7 of the Constitution of the Republic of Kosovo, Articles 20 and 27 of Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law) and Sections 52.1 and 54(b) of the Rules of Procedure of the Constitutional Court (the Rules).

Summary of the Proceedings before the Court

6. On 3 December 2009 the Applicant filed a Referral to the Constitutional Court. The President appointed Judge Iliriana Islami as Judge Rapporteur and appointed a Review Panel comprising, Judges Altay Suroy, presiding, Almiro Rodrigues and Gjylieta Mushkolaj. A Decision rejecting Interim Measures was issued by the Court on 21 April 2010 and published on the Court's website on 25 May 2010. The Court deliberated on the admissibility of the Referral on 29 April 2010.

The Facts

7. The Office of the Municipal Public Prosecutor for Prizren brought an indictment against the Applicant, PP. No. 2085/2008 dated 27 August 2008 for the criminal offence, of issuing an unlawful judicial decision, as provided for in Article 346 of the Criminal Code of Kosovo.

8. The Municipal Court of Deçan as the criminal court of first instance, in a Decision KA. No. 14/2008 also dated 27 August 2008, overturned the charges filed by the Public Prosecutor on the grounds that there was not sufficient proof to support a grounded suspicion that the Applicant had committed the criminal offence with which he was charged.

9. By a Decision KA. no. 14/2008 dated 7 October 2008, a panel of the Municipal Court of Deçan upheld that finding and rejected the Appeal which had been brought against the original decision of the Municipal Court by the Public Prosecutor.

10. On 01 September.2009 the Supreme Court of Kosovo, in its review of request for protection of legality, filed by the Public Prosecutor against that decision, issued a Judgment PKL. nr. 120/08, finding the request for protection of legality grounded, and finding that the disputed Decision issued in favour of the Applicant was not in accordance with a proper interpretation of Articles 304 to 316 of the Criminal Procedure Code of Kosovo.

11. On 21 April 2010 the Constitutional Court of Kosovo issued a Decision refusing to issue interim measures against the decision of the Supreme

Court of Kosovo without prejudice to any further decision it would made in relation to admissibility of the Referral of on its merits.

Assessment of the Admissibility of the Referral

12. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this connection, the Court refers to Article 113.7 of the Constitution, which provides: "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."

13. The Court wishes to emphasise 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. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). 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 is satisfied (see, *mutatis mutandis*, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).

14. This Court applied this same reasoning when it issued a Decision on 27 January 2010 on inadmissibility on the grounds of non exhaustion of remedies in the case of AAB-RIINVEST University L.L.c., Pristina vs. Government of the Republic of Kosovo, Case No. KI. 41/09 and in the Decision of 23 March 2010 in the case of Mimoza Kusari-Lila vs. The Central Election Commission, Case No. KI 73/09.

15. There is an indictment pending against the Applicant before the Courts of the Republic of Kosovo as set out above. That indictment relates to the conduct of the Applicant in his capacity as a Judge of the Municipal Court of Malisheva. Article 107 of the Constitution of the Republic of Kosovo quoted above specifically provides that Judges shall be immune from prosecution. It is a widely recognised principle that Judges have to enjoy immunity from prosecution for actions taken within the scope of their responsibility in order to ensure that they will be independence of their role. Its purpose is also to ensure that in a democratic society governed by the rule of law that Judges may be fearless in exercising their judicial functions.

16. However judicial immunity is not absolute. Article 107.2 specifically states that Judges shall not enjoy immunity and that they may be removed from office if they have committed an intentional violation of the law. The proper forum for determining whether there has been such a violation, if such amounts to a criminal violation, is the appropriate court. In this case it is for the criminal courts to make a determination as to his guilt or innocence, always bearing in mind that the Applicant enjoys the guarantee of the presumption of innocence in relation to the indictment brought and that he has a right to a fair trial as provided by Article 6 of the European Convention on Human Rights

17. The Supreme Court has decided that the request for protection of legality filed by the Public Prosecutor was well grounded. In those circumstances the criminal proceedings must proceed. It would be premature for the Constitutional Court to determine the Referral without there being a final determination in the criminal proceedings. The Court must conclude that not all remedies available to the Applicant have been exhausted as the indictment is still with the criminal courts.

FOR THESE REASONS

18. The Court after considering all the facts and the evidence tendered, and having deliberated on the matter on 29 April 2010 concludes that that the Referral is inadmissible because the Applicant's complaint is premature, and the Court therefore unanimously

DECIDES

I. TO REJECT the Referral as inadmissible.

II. 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 on the Constitutional Court.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr. Iliriana Islami, signed	Prof. Dr. Enver Hasani, signed

Ismet Bajrami vs. NewCo Ferronikeli Complex LLC

Case KI 01/09, decision of 30 April 2010
Keywords: Individual referral, right to work, discrimination in employment.

The applicant filed a referral alleging the violation of right to work, which according to him, was a result of application of discriminatory practices in employment, when the applicant was refused employment because he "was from another municipality". The applicant did not provide any details if he had used any other legal remedies that may have been available.

The Constitutional Court rejected the referral as inadmissible, reasoning that the applicant failed to provide any evidence that he had used other legal remedies available, thus not meeting the requirements for filing a referral, as per Article 113.7.

Pristina, 30 April 2010
Ref. no.RK: 29/10

RESOLUTION ON INADMISSIBILITY

Case No.KI 01/09
Applicant
Ismet Bajrami
vs.
Respondent
NewCo Ferronikeli Complex L.L.C

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

The Applicant.

1. The Applicant is Ismet Bajrami, of Oshlan Village, Vustrri, Kosovo.

The Responding Party

2. The Responding Party is NewCo Ferronikeli Complex L.L.C. of 37, L.e. Pejes 4 str, 12000 Fushe, Kosovo

Subject Matter of the Referral

3. The Applicant, who is unrepresented, submitted a Referral to the Constitutional Court on 9 February 2009 claiming an alleged violation of the right to work, arising from what he alleges was discriminatory practices of recruiting. In particular, the Applicant states that he was refused employment on the grounds that he "came from another Municipality".

The Facts

4. The Applicant was originally employed by a former socially owned enterprise, "Ferronikeli" in Gllagoc-Drenac. He was employed as a machinery mechanic with a title of Main Heavy Oil Storage Operator.

5. The Applicant commenced employment with "Ferronikeli" on 20 April 1984. Due to events surrounding unrest in Kosovo the Enterprise ceased operating in 1998 and the Applicant was therefore without work.

6. The Enterprise was subsequently privatized on 4 April 2006 and a new company was established, NewCo Ferronikeli Complex L.L.C., the Responding Party. The Responding party recruited 1,000 employees; however, the Applicant was not one of those recruited under the selection process carried out by the new management. 900 former employees were not selected for employment following the recruitment process.

Legal Basis for the Application

7. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article 20 of 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).

Summary of the proceedings before the Court

8. On 9 February 2009, the Applicant lodged a Referral with the provisional secretariat of the Constitutional Court. On 11 February 2009

the Court wrote to the Applicant acknowledging the receipt of the Referral and requesting the Applicant to call to the office of the Constitutional Court to complete a Referral Form. The completed Form was submitted to the Court on 4 December 2009.

9. The President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur. A Review Panel consisting of Judges Altay Suroy, Chair, and Judges Gjylieta Mushkolaj and Almiro Rodrigues was established.

10. On 10 December 2009 The Court notified the Responding party of the making of the Referral and sent a copy of the Referral to it requesting a response. The Respondent replied on 15 December 2009. The response pointed out that the Applicant was one of 900 former employees of the ex- "Ferronikeli" company who were not employed in the recruitment process for the privatised company.

11. They pointed out in their Reply also that former employees not selected in the recruitment process were entitled to apply to the Kosovo Privatisation Agency for implementation of their employment rights. They denied that the Applicant was ever employed or had any labour relations with the new company NewCo Ferronikeli Complex L.L.C.

12. The Applicant was sent a copy of the Respondent's reply on 5 February 2010 and he was requested to address the contentious aspects of his case raised by the Respondent. He was also requested to provide details of what measures he took to enforce his employment rights in any court or other tribunal.

13. The Applicant replied to the Court by letter on 10 February 2010. In his reply he pointed out that there were difficulties with providing certain documentation requested by the Court. He did not, however, give details of any steps that he had taken to pursue his grievances before any Court or administrative authority or that he had pursued any local remedies that might be available to him.

Assessment of the Admissibility of the Referral

14. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this connection, the Court refers to Article 113.7 of the Constitution, which provides: "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."

15. The Court wishes to emphasise 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. (see, *mutatis mutandis*, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). 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 is satisfied (see, *mutatis mutandis*, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).

16. This Court applied this same reasoning when it issued a Decision on 27 January 2010 on inadmissibility on the grounds of non exhaustion of remedies in the case of AAB-RIINVEST University L.L.c., Pristina vs. Government of the Republic of Kosovo, Case No. KI. 41/09 and in the Decision of 23 March 2010 in the case of Mimoza Kusari-Lila vs. The Central Election Commission, Case No. KI 73/09.

17. Bearing this in mind it is clear from the documentation submitted that there is complete lack of evidence before the Court that the Applicant took any step to pursue his claim through the courts or any administrative authority that may be available to him. Therefore, he did not exhaust all legal remedies provided by law as required for him to be able to pursue a claim to the Constitutional Court.

FOR THESE REASONS

18. The Court after considering all the facts and the evidence tendered, and having deliberated on the matter on 30 April 2010 concludes that the Applicant has not exhausted all legal remedies available to him and

DECIDES UNANIMOUSLY

I. TO REJECT the Referral as inadmissible.

II. 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 on the Constitutional Court.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova, signed	Prof. Dr. Enver Hasani, signed

Ali Hasan Tahiri vs. Supreme Court Decision Nr.271/2009

Case KI 71/09, decision of 11 May 2010
Keywords: individual referral, right to work, judicial protection of rights, equality before the law, general principles of fundamental human rights and freedoms.

The applicant filed a referral against the Supreme Court Decision whereby the municipal and district courts' decisions for allowing payment of compensation from the Kosovo Energy Corporation (KEK) as e right to applicant's pension, were annulled. The applicant claims that his right to a fair and impartial trial and his property rights were violated. The Constitutional Court Decided to reject the referral of the applicant as on the grounds of inadmissibility with reasoning that the referral of the applicant is time barred as it was filed after the deadline of 4 months as foreseen by the law and as such the applicant cannot be considered to have met the admissibility criteria.

Pristina, 11 May 2010
Ref. no.: RK 16/10

RESOLUTION

Case No. KI. 71/09,
Ali Hasan Tahiri
vs.
Supreme Court Decision Nr. 271/2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Kadri Kryeziu, Vice-President
Snezhana Botusharova,
Robert Carolan, Judge
Ivan Čukalović, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjylieta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

Applicant

1. The Applicant is Ali Hasan Tahiri, residing in the Village of Duar, Municipality of Vustrri.

Challenged decisions

2. In his Referral, the Applicant challenges Judgment Nr. 361/2006 of the Municipal Court of Pristina dated 16 April 2008. He also mentions Judgment Nr. 271/2009 of the Supreme Court dated 15 July 2009 as the last effective remedy.

Subject matter

3. The Applicant deems that Articles 3 (Equality before the law), 21 (General principles of human rights and fundamental freedoms) and 54 (Judicial protection of rights) of the Constitution have been violated.

Legal basis

4. Article. 113 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Articles 20, 27.7 and 27.8 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).

Summary of the proceedings before the Court

5. The Applicant submitted his Referral to the Constitutional Court on 10 December 2009. On 18 February 2010, after having considered the Report of the Judge Rapporteur, Almiro Rodrigues, the Review Panel, composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Gjylieta Mushkolaj, forwarded its recommendation to reject the case as inadmissible to the full Court on the same day.

Summary of facts

6. It appears from the documents submitted by the Applicant, that, on 26 October 2006, he filed a “request for continuation of an indemnity compensation” with the Municipal Court of Pristina, stating that, on 1 September 2006, the Kosovo Energy Corporation (KEK), without issuing any decision and without any legal basis for termination of the “Agreement on temporary remuneration of indemnity” (105 Euro/month) concluded between the Parties on 15 August 2001, had ceased to pay the indemnity.

7. By judgment of 16 April 2008, the Municipal Court granted the Applicant's claim and ordered KEK to pay the monthly sum of 105 E, including the arrears, to him. The Court found that the conditions envisaged in the Agreement had not been met for KEK to cease the payment of the compensation and ordered it to continue with the monthly payments in accordance with the Agreement concluded between the Parties.

8. Thereupon, KEK filed an appeal with the District Court in Pristina, requesting it to squash the judgment of the Municipal Court and to refuse the Applicant's claim. The Court, however, upheld the judgment, and rejected KEK's appeal as unfounded. It stated that the court of first instance had correctly determined the factual situation and appropriately applied the substantive law; moreover, the Agreement had created rights and obligations for the Parties, which KEK was obliged to fulfill in accordance with Article 17 of the Law on Obligations and Torts and no change in the Statute of KEK's supplemental pension fund could have retroactive effects to the detriment of the Applicant.

9. On 12 March 2009, KEK filed a revision with the Supreme Court.

10. On 24 April 2009, the Applicant submitted an "application for execution" to the Municipal Court, asking it to freeze KEK's bank account and to have the monies owed to him transferred to his bank account.

11. Before the Municipal Court could decide on the Applicant's request, the Supreme Court ruled on 15 July 2009, that the lower courts had wrongfully applied the substantive law, when they concluded that the Applicant's claim was well-founded; it, therefore, accepted the revision and annulled both judgments, while refusing the Applicant's claim as ill-founded.

Applicant's allegations

12. Without elaborating his constitutional claims, the Applicant complains that his human rights under Arts. 3, 21 and 54 of the Constitution (see also under "Subject matter" above) have been violated.

Assessment of the Admissibility of the Referral

13. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and the Law.

14. In this connection, the Court refers to Article 49 (Deadlines) of the Law, stipulating 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced…".*

15. The Court notes that in his Referral, when asked to "state the date of service of a decision on the last effective remedy used", the Applicant indicated: "KOSOVO SUPREME COURT - Rev. nr. 271/2009, date: 15.07.2009".

16. Taking into account the fact that the Applicant filed the Referral on 10 December 2009, the Court concludes that he has not submitted his constitutional complaint within the mandatory period of four months as stipulated by Article 49 of the Law.

17. In these circumstances, the Applicant cannot be considered to have fulfilled the requirements for admissibility of the Referral.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 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 shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues, signed	Prof. dr. Enver Hasani, signed

Mehdi Faik Fazliu vs. Decision AP No. 141/2004 of the Supreme Court of Kosovo, and Decision P. No. 233/2002 and P. No. 265/2002 of the District Court

Case KI 31/09, decision of 11 May 2010
Keywords: individual referral, right to fair and impartial trial, prescription

The applicant filed a referral alleging that his right to a fair and impartial trial was violated by judgments of the District Court in Pristina and Supreme Court of Kosovo, which found the applicant guilty of criminal offence of "premeditated murder".

The Constitutional Court decided to reject applicant's referral as inadmissible, with the reasoning that the referral was submitted after the deadline provided by Law.

Pristina, 11 may 2010
Ref. no.: RK20 /10

RESOLUTION

Case No. KI. 31/09,
Mehdi Faik Fazliu
vs.
Supreme Court Decision Ap Nr 141/2004
District Court P. Nr. 233/2002 and P. Nr. 265/2002

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Snezhana Botusharova,
Robert Carolan, Judge
Ivan Čukalović, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjylieta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

Applicant

1. The Applicant is Mehdi Faik Fazliu, currently serving his prison sentence in Dubrava Prison, Republic of Kosovo.

Challenged decisions

2. In his Referral, the Applicant challenges Judgments Nr. 233/2002 and Nr 265/2002 of the District Court of Pristina, dated 23 December 2003. He also challenges Judgment Nr. 141/2004 of 29 September 2004 of the Supreme Court.

Subject matter

3. The Applicant deems that the right to a fair and impartial trial as guaranteed by the Constitution, has been violated.

Legal basis

4. Article. 113 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Articles 20, 27.7 and 27.8 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).

Summary of the proceedings before the Court

5. The Applicant submitted his Referral to the Constitutional Court on 30 April 2009. On 18 February 2010, after having considered the Report of the Judge Rapporteur, Almiro Rodrigues, the Review Panel, composed of Judges Altay Suroy (Presiding), Gjylieta Mushkolaj and Kadri Kryeziu, forwarded its recommendation to reject the case as inadmissible to the full Court on the same day.

Summary of facts

6. It appears from the documents submitted by the Applicant, that, as of 11 July 2002, he has been imprisoned in Dubrava Prison in the Republic of Kosovo.

7. On 29 September 2004, the Supreme Court of Kosovo rendered Judgment No. Ap. Nr 141/2004 in the Applicant's case and confirmed the District Court Judgments P Nr 233/2002 and P Nr 265/2002 of 23 December 2003, according to which the Applicant was found guilty of the criminal offence of premeditated murder and imposed on him a punishment of 13 years imprisonment, including the time served in detention on remand.

Applicant's allegations

8. The Applicant alleges that he is wrongly convicted of the criminal offence of murder, that he is innocent and that his human right to a fair and impartial trail, as guaranteed by the Constitution, has been violated.

Assessment of the Admissibility of the Referral

9. In order to be able to adjudicate the Applicant's Referral, the Constitutional Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and the Law.

10. In this connection, the Constitutional Court refers to Article 49 (Deadlines) of the Law, stipulating 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced…".*

11. The Constitutional Court notes that the Applicant was served with the Supreme Court decision (i.e. the Supreme Court Judgment Ap. Nr. 141/2004) on 29 September 2004.

12. The Constitutional Court also notes that the Applicant filed the Referral on 30 April 2009.

13. In these circumstances, the Referral must be considered time-barred in application of Article 49 of the Law.

14. Consequently, the Applicant cannot be considered to have fulfilled the requirements for admissibility of the Referral.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 49 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 shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues, signed	Prof. dr. Enver Hasani, signed

Agim Kryeziu vs. the Municipality of Prizren

Case KI 21/09, decision of 11 May 2010
Keywords: individual referral, right to reconstruction of property.

The applicant filed a referral alleging that his right to reconstruct the property was violated, since his application to municipal authorities in Prizren and Malisheva for financial assistance for reconstruction of property was not approved.

The Constitutional Court decided to reject the referral as inadmissible, thereby reasoning that the applicant may not be considered to have met the requirements as per Article 113.7 of the Constitution, which provides that "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".

Pristina, 11 maj 2010
Ref. No.: RK 15 /10

RESOLUTION

Case No. KI. 21/09,
Agim Kryeziu
vs.
Municipality of Prizren

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Snezhana Botusharova, Judge
Robert Carolan, Judge
Ivan Čukalović, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjylieta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

Applicant

1. The Applicant, Agim Kryeziu, is residing in Prizren.

Responding Party

2. The Responding Party is the Municipality of Prizren.

Subject matter

3. The Applicant claims that he has submitted numerous requests to the Municipalities of Prizren and Malisheva, asking for support in order to enable him to reconstruct his property which was damaged during the war, but has not received any support so far.

Legal basis

4. Article. 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article 20 of 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).

Summary of the proceedings before the Court

5. The Applicant submitted his Referral to the Constitutional Court on 15 June 2009. On 18 February 2010, after having considered the Report of the Reporting Judge, Almiro Rodrigues, the Review Panel, composed of Judges Robert Carolan (Presiding), Snezhana Botusharova and Iliriana Islami, forwarded its recommendation to the full Court to reject the case as inadmissible on the same day.

Facts

6. It appears from the documents submitted by the Applicant, that, on 15 May 2001, while he was living with 7 family members in a house which had suffered substantial damages during the war, he received confirmation from the Commission for Construction and Reconstruction of the Municipality of Malisheva that no construction material would be provided to him. A further confirmation was sent to the Applicant on 5 August 2002, which stated that the Applicant had not received any assistance in the rebuilding of his house and that the confirmation should be used to enroll in a reconstruction program. On 15 August 2002, the Applicant bought a piece of land in the Municipality of Prizren.

7. By letter of 3 August 2004, the Applicant, who had apparently submitted a request for aid to the Municipality of Prizren, was informed by the Prizren Directorate for Construction, Reconstruction, Development and

Public Investments that aid could only be provided to the citizens of Prizren Municipality and that he should submit his problem to the competent organs of Malisheva Municipality, since his house was burned down in Pagarusha Village in the Municipality of Malisheva.

8. On 12 September 2006, the Applicant requested Prizren Municipality to review his previous request for construction material for his house in the Municipality of Malisheva. He referred to the fact that he had bought a piece of land in Prizren and was now, together with his family, a resident of Prizren.

9. By letter of 4 April 2007, the Applicant reiterated his request to Prizren Municipality, informing it that he had by then not received any construction aid from any of the Municipalities, although he had no roof over his head, faced a serious health situation, had a family of seven and was unemployed. He submitted a further request on 25 May 2007.

10. Again, by letter of 26 May 2009, the Applicant wrote to the Directorate for Reconstruction of the Municipality of Prizren, explaining that, despite his numerous requests, he still had not received any aid, although the Ombudsperson, whom he had also approached, had told him that sooner or later he would benefit from aid from the Municipality of Prizren. He added that he would pursue his request all the way to the Constitutional Court.

Applicant's allegations

11. The Applicant complains that, since the end of the war, he has addressed numerous requests for reconstruction of his house which was damaged during the war to the Municipalities of Prizren and Malisheva, but has not received any support so far. He claims that his right to the reconstruction of his property has been violated.

Comments by the Responding Party

12. The Responding Party, to which the Referral was communicated by the Court's Registry Office on 18 December 2009, did not submit its comments within the period of 45 days, as provided by Article 22.2 of the Law.

Assessment of the Admissibility of the Referral

13. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution.

14. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

    "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";

and to Article 47.2 of the Law, stipulating that:

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

15. The Court notes, however, that in his Referral, the Applicant has not submitted any evidence whatsoever, that he appealed either from the decisions of the Municipality of Prizren, or from those of the Municipality of Malisheva or used any other remedy, which may have been open to him under applicable law in order to challenge the contested decisions or to complain about the absence of a decision.

16. As indicated in Case No. KI.41/09, AAB-RIINVEST University vs. the Government of the Republic of Kosovo (Resolution Nr. RK-04/10 of the Constitutional Court of the Republic of Kosovo, dated 27 January 2010), the Court wishes to emphasize that the rationale for the exhaustion rule, as interpreted by the European Court of Human of Rights (see Article 53 of the Constitution), 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. This is an important aspect of the subsidiary character of the Constitution. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). 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 is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).

17. In this connection, the Court would like to stress that applicants are only required to exhaust remedies that are available and effective. Discretionary or extraordinary remedies need not to be exhausted, for example, by requesting a court to revise its decision (see, mutatis mutandis, ECHR, Cinar v. Turkey, no 28602/95, decision of 13 November 2003). Where an applicant has tried a remedy that the Court considers inappropriate, the time taken to do so will not interrupt the running of the four-month time limit (Art. 49 "Deadlines" of the Law), which may lead to the complaint being rejected as out of time (see,

mutatis mutandis, ECHR, Prystavka, Rezgui v. France, no 49859/99, decision of 7 November 2000).

18. As to the present case, the Applicant submitted his constitutional complaint directly to this Court, arguing that his right to the reconstruction of his property had been violated, without invoking any Article of the Constitution or of the European Convention of Human Rights and Fundamental Freedoms.

19. Furthermore, Law No. 02/L-28 on the Administrative Procedure of 22 July 2005, in its Section IX, provides that "Any interested party has a right to appeal against an administrative act or against an unlawful refusal to issue an administrative act" (Article 127.2), while "The administrative body, the appeal is addressed to, shall review the legality and consistency of the challenged act" (Article 127.3). Moreover, the Law provides that "The interested parties may address the court only after they have exhausted all the administrative remedies of appeal" (Article 127.4).

20. However, in his submissions, the Applicant has not substantiated in whatever manner, why he considers that the legal remedies, mentioned in Law No. 02/L-28 on the Administrative Procedure, including an appeal to the regular courts, would not be available and, if available, would not be effective and, therefore, not need to be exhausted.

21. In these circumstances, the Applicant cannot be considered to have fulfilled the requirements under Article 113.7 of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, 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 shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues, signed	Prof. dr. Enver Hasani, signed

Applicant X vs. Decision of the Senate of University of Pristina

Case KI 37/09, decision of 13 May 2010
Keywords: individual referral, right to work

The Applicant submitted a referral to the Constitutional Court challenging the decision of the Senate of University of Pristina, which rejected the applicant's complaint on the decision for selection of a candidate in the position of professor, as per vacancy announcement. He claims to have been denied the right to work but does not elaborate the matter in detail.

The Constitutional Court decided to reject the referral as inadmissible with reasoning that the applicant had not exhausted legal remedies that are available to him, respectively, had not addressed to a court that is competent to take a decision regarding his referral.

Pristina, 13 May 2010
Ref.No. : RK 40/10

DRAFT- RESOLUTION ON INADMISSIBILITY
in
Case no. KI 37/09
Applicant Reshat Karanxha X
vs.
Decision of the Senate of the University of Pristina,
dated 29/09/2009
Opposing Party Kosovo Judical Council

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalovič, Judge
Gjyljeta Mushkolaj, Judge
lIiriana Islami, Judge

1. Unanimously adopts the Resolution on Inadmissibility of the Referral. President of the Court, Dr. Enver Hasani, pursuant to 18, paragraph 1 item 1.3 of the Law on the Constitutional Court of the Republic of Kosovo (Law no. 03/L -121) declared a conflict of interest and requested

his exclusion for the proceedings of this case, and his request was approved by judges. The President did not participate during any stage of review or during the decision-making process for this case.

The applicant is resident of the Republic of Kosovo.

2. The applicant challenged the Decision of the Senate of the University of Pristina, dated 29.09.2008, which rejected the applicant's complaint on the selection of a candidate in the position of professor for the course "Criminology and Criminology Tactics", as per the vacancy announcement of 07.03.2008.

3. The applicant argues that the challenged decision has violated: the basic principles of the European Convention of Human Rights and the Universal Declaration of Human Rights; the basic principles of the Constitution of Kosovo and the Statute of the University of Pristina.

The legal basis

4. Article 113 of the Constitution of the Republic of Kosovo (hereinafter "the Constitution"); Article 20 of Law 03/L-121 on the Constitutional Court of the Republic of Kosovo (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").

Summary of proceedings before the Court

5. The applicant submitted his referral before the Constitutional Court on 11 September 2009. The applicant requested from the Court not to disclose his identity in its decision and his request was approved.

6. On 13 May 2010 and following the review of the report by Judge Rapporteur Kadri Kryeziu, the Review Panel, composed of Judge Iliriana Islami, Judge Altay Suroy and Judge Gjylijeta Mushkolaj, presented its own recommendations to reject the case as inadmissible before the full Court.

Facts

7. On 29.10.2008, the applicant received the decision, ref. no.2/593, dated 6.10.2008, issued by the Senate of the University of Pristina which rejected his complaint filed therein, on the selection of another candidate as professor of course "Criminology and Criminology Tactics", pursuant to the vacancy announcement published in media on 07.03.2008.

8. On 21.11.2008, the Applicant X addressed the Ministry of Education, Science, and Technology, respectively the Inspection Service, requesting the annulment of the decisions as per item 7 of the aforementioned decision and the reasoning of the Senate of the University of Pristina, dated 07.03.2008, by considering them "**illegal, anti-scientific, inhumane and discriminatory**".

9. On 02.03.2009, the applicant of the referral addressed the Prime Minister of Kosovo and the Independent Oversight Board of Kosovo, requesting the annulment of decisions as per item 7 of the aforementioned decision and based on the same reasoning.

10. On 04.05.2009, the Independent Oversight Board of Kosovo, with the Decision A 02 (48) 09, declared itself incompetent for adjudication in relation to the applicant's complaint, challenging the selection of a candidate pursuant to the public vacancy announcement of the University of Pristina, in line with Article 10.2 of UNMIK Regulation No.2008/12 amending UNMIK Regulation No.2001/36 on the Kosovo Civil Service; Article 25 paragraph 25.5 of the Law on Higher Education (Law no.2002/03 of Assembly of the Republic of Kosovo) and Article 178 of the Statute of University of Pristina.

Contentions of the applicant

11. The applicant in his referral contends that his right to work, provided by Article 49.1 of the Constitution, has been violated. The applicant does not elaborate the matter further.

Preliminary assessment of the admissibility of referral

12. In order to decide about the applicant's referral, the Court must firstly review if the applicant has fulfilled the admissibility conditions provided by the Constitution. In relation to this, the Court refers to Article 113.7 of the Constitution which provides that:

    "*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.*"

13. Article 48 of the Law provides that:

    "*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.*"

14. On the basis of the documentation presented for this case, the Court concludes that, following the decision by the Independent Oversight Board (decision A 02(48)2009), the applicant did not use any legal remedy for appeal even though the legal instruction by the Independent Oversight Board clearly underlined that the decision is subject to "judicial review in conformity with the law."

15. The Court also emphasises that domestic legislation, especially the Law on Contested Procedure (Law no. 03/L-006 of Assembly of the Republic of Kosovo), prescribes the competence for disputes related to Labour Contracts to the ordinary courts, and also provides effective legal remedies of appeal for realizing the rights which are allegedly violated.

16. Moreover, Article 475 of this Law provides that: "In contentious procedures in work environment, especially is setting the deadlines and court sessions, the court will always have in mind that these cases need to be solved as soon as possible."

17. For the all foregoing, the Court assess that Applicant X has not addressed any competent court for adjudication in relation to the referral filed before the Constitutional Court.

18. The Court wants also to emphasize that the reasoning for the exhaustion of legal remedies is to provide the authorities in question, including the courts, an opportunity to prevent or correct the alleged Constitutional violations. This rule is based on the assumption that Kosovo's legal order shall provide effective legal remedies in case of violation of constitutional rights (see, *mutatis mutandis*, ECHR, Selmouni v. France no. *25803/94,* Decision of 28 July 1999).

19. The Court determines that a mere suspicion with regards to the perspective of the matter is not sufficient to exclude an appellant from his obligation to appeal the competent domestic organs (see Whiteside v. the United Kingdom, decision of 7 March 1994, Application no. 20357/92, DR 76, p.80).

20. In addition, the applicant of the referral did not clarify accurately the referral nor did the applicant justify the referral either in its procedural or substantive aspect in order to prove that a right guaranteed by the Constitution had been violated.

FOR THAT REASON

21. On 13 May 2010, the Court following the review of all facts and presented proofs, and following the review of the case, concluded that the applicant

of the referral did NOT exhaust all available legal remedies and therefore unanimously:

DECIDED

I. To REJECT the Referral as Inadmissible.

II. In conformity with Article 20.4 of the Law on the Constitutional Court, this decision shall be communicated to the parties and it shall be published in the Official Gazette.

III. This Decision shall enter into force immediately.

Judge Rapporteur	**Judge of the Constitutional Court**
Mr.Sc Kadri Kryeziu , signed	Robert Carolan (as per authorization), signed

Roland Bartetzko vs. Decision S.C.AP-KZ 181/2002 of the Supreme Court

Case KI 02/10, decision of 16 August 2010
Keywords: Individual referral, interim measure, right to effective legal remedies, right to appeal, and return of missed deadline for filing the appeal.

The applicant filed a referral alleging violation of his right to effective legal remedy, right to appeal, and human rights guaranteed by European Convention on Human Rights and Freedoms. The applicant alleged to have been deprived of his fundamental right of appeal against the judgment of the Court, because his defence counsel erroneously informed him that he did not enjoy the right of appeal against the pronounced sentence. According to the applicant, the decision of the Supreme Court did not include the legal instruction on his right to appeal, and the Presiding Judge did not provide any verbal instructions on this matter. The applicant claimed that due to these reasons he was not able to exercise his right to appeal. At the same time, the applicant requested the court to impose interim measures, thereby requesting return of legal deadline for appeal against the judgment of the Supreme Court.

The Constitutional Court rejected the request of the applicant for interim measures, reasoning that he had not submitted any evidence which justified restoration of the legal timeline, as an interim measure, and that it would be necessary to avoid any risk or irrecoverable damage, or that such a measure was in the public interest.

Pristina, 16 August 2010
Ref. No.: RMP 39/10

DECISION ON THE REQUEST FOR INTERIM MEASURES
in
Case No. KI 02/10
Roland Bartetzko
vs.
The Decisions of the Supreme Court of Kosovo, S.C. AP-KZ 181/2002 of 12 November 2002

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 Čukalovič, Judge
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Unanimously adopts the following decision denying the request for interim measures, without prejudice to any final Decision on the Referral as to admissibility or the merits.

The Applicant

1. The Applicant is Mr. Roland Bartetzko. He is a German national. He is serving a sentence in Dubrava Prison near Istok, Kosovo. He is represented by Dr. Kolë Krasniqi of Gllaviçicë, Pejë.

The Challenged Decisions

2. The Supreme Court of Kosovo, S.C. AP-KZ 181/2002 of 12 November 2002.

Subject Matter

3. The Applicant argues that his rights guaranteed by Articles 30 (rights of the accused), 32 (right to legal remedies), and 102.5 (right to appeal) of the Constitution of the Republic of Kosovo, and his rights under the European Convention of Human Rights, and the Universal Declaration on Human Rights have been violated. He argues that he was deprived of his fundamental right to appeal because his defense counsel erroneously informed him that he did not have the right to appeal his conviction.

4. He requests that the Court impose a temporary interim measure to reinstate the legal timeline of his appeal against Judgment Ap.Nr. 181-2002 of the Supreme Court of Kosovo, which became final over six years before the Constitution of Kosovo entered into force.

Legal Basis

5. Art. 116.2 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Art. 27 of Law No. 03/L-121 on the Constitutional Court of Kosovo (hereinafter referred to as: the Law), and Art. 52.1 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

The Facts

6. On 10 May 2002, the District Court of Pristina found the Applicant guilty of, among other things, a criminal act of terrorism under Article 125 in relation to Article 129 paragraph 2 in connection with paragraph 1 (amended on 16 June 1993, Official Gazette of the FRY-No. 37-193) of the Criminal Code of Yugoslavia. The Court found that on 18 April 2001 the Applicant placed explosive material outside the offices of the Centre for Peace and Tolerance, where representatives of the Former Yugoslavia worked. The explosion caused the death of a senior representative of the Serbian government there. It also injured four staff members of the Centre. The Court sentenced Mr. Bartetzko to 23 years in prison. (D.C.P. Nr. 1722-2001).

7. On 12 November 2002, the Supreme Court of Kosovo modified the verdict of the District Court. The Court partially adopted the Applicant's appeal and found that he was guilty of a criminal act of terrorism under Article 125 in relation to Article 139 paragraph 2 of the Criminal Code of Yugoslavia. The Court amended his sentence to 20 years imprisonment, including time spent in detention from 20 April 2001. (S.C. Ap.Nr. 181-2002).

8. According to the Applicant his attorney, Tome Gashi, did not appeal the decision of the Kosovo Supreme Court, nor did he inform him of his right to appeal. Instead, he told the Applicant that he had no right to appeal. After the fifteen day deadline for filing an appeal expired, the decision became final.

9. On 31 December 2002, the Applicant received a copy of the judgment of the Supreme Court of Kosovo.

10. After the deadline expired, Mr. Gashi asked the Supreme Court to modify the decision. He argued that the parties should have the right to appeal because the decision did not contain a legal remedy. On 8 June 2003, the Supreme Court informed the Applicant that it could not accept his request because it was filed more than half a year from the date of receipt of the verdict.

11. On 15 June 2002, the Applicant withdrew Mr. Gashi's power of attorney.

12. On 8 August 2003, the Applicant requested through his attorney, Fazli Balaj, that the District Court of Pristina restore the legal timeline of the appeal. On 6 January 2004, the District Court of Pristina dismissed the Applicant's request because it was filed after the statutory period

prescribed by Article 92, paragraphs 1 and 2, of the Criminal Code of Yugoslavia.

13. On 10 November 2009, the State Prosecutor of Kosovo informed the Applicant that his request to the Supreme Court of Kosovo was dismissed because it lacked a legal basis.

Proceedings before the Constitutional Court

14. On 7 December 2009 the Applicant filed his Referral with the Constitutional Court. On 5 January 2010, the Applicants supplemented the Referral with further arguments requesting the Court to issue Interim Measures ordering "reinstatement of the legal deadline for the appeal."

15. On 13 May 2010 the Review Panel, considered the Report of Judge Suroy and recommended that the full Court deny the request for an interim measure.

The Applicant's Complaints

16. The Applicant complains that his right to appeal guaranteed by Article 102 of the Constitution and Article 394 (1) of the Provisional Criminal Procedure Code of Kosovo has been violated. According to him, Article 30 of the Constitution that guaranties rights of the accused has been also violated.

17. The Applicant argues that he was denied his ability to exercise these fundamental rights. The decision of the Supreme Court of Kosovo of 12 November 2002 did not include legal instructions regarding his right to appeal, nor did the presiding judge give him any verbal instructions. Furthermore, his attorney told him that he did not have a right to appeal. The decision against him only became final because (1) his attorney gave him incorrect advice; and (2) he did not knowledge of the official language of the applicable law in Kosovo. Thus, he was unable to exercise his right to appeal.

18. Finally the Applicant argues that this violates the Provisional Criminal Procedure of Kosovo and the Provisional Criminal Code of Kosovo, as well as the Constitution of Kosovo, the law of the European Union, the European Convention of Human Rights, and the Universal Declaration on Human Rights. In order to remedy this violation, the legal timeline of his appeal should be reinstated.

Assessment of the Request for Interim Measures

19. The Applicant has not submitted any evidence that would justify ordering an interim measure to reinstate the legal timeline of his appeal. He has not proven that the proposed interim measure is necessary to avoid any risk of irreparable damage, or whether such a measure is in the public interest, as required by Article 27 of the Law on the Constitutional Court. It follows that the request must be denied.

FOR THESE REASONS

20. The Constitutional Court, pursuant to Article 20 of the Law, and Section 54(b) of the Rules of Procedures, unanimously, in its session of 16 August 2010:

DECIDES

I. To REJECT the request for interim measures

II. The Secretariat shall notify the Parties of the Decision and shall publish it in the Official Gazette in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur
Altay Suroy, signed

President of the Constitutional Court
Prof. Dr. Enver Hasani, signed

Demë Kurbogaj and Besnik Kurbogaj vs. Decision Pkl. No. 61/07 of the Supreme Court, Decision AP. No. 510/2007 of the Supreme Court

Case KI 07/09, decision of 19 May 2010
Keywords: individual referral, right to fair and impartial trial, personal integrity, cruel, inhuman and humiliating treatment.

Applicants filed a referral alleging that in their trial, their rights protected under the Constitution were violated, claiming that facts of the case were not fairly assessed by the Supreme Court, and that the case was decided with prejudice and pressure exercised on witnesses. At the same time, applicants allege that judgment against them was, *inter alia*, grounded upon inadmissible evidence, and that during the proceeding, various procedural violations were committed within the courtroom, mostly by the prosecutor, which violated their personal integrity. Ultimately, applicants underline that they were not guilty of criminal offence they were charged with.

The Constitutional Court decided to reject applicants' referral as inadmissible, thereby reasoning that applicants have not described or demonstrated the violation of their rights to a fair and impartial trial. Further, the Court considers that referral does not contain any fact which would prove that the Court, when reviewing the case, lacked impartiality, or that the procedure was unfair. According to the Court, the fact that the applicant is discontented with the outcome of the case is not an argument for violation of Article 31 of the Constitution on fair and impartial trial.

Pristina, date: 19 May 2010
Ref. No.: AGJ 21/10

RESOLUTION ON INADMISSIBILITY

Case No. KI 07/09
Demë KURBOGAJ and Besnik KURBOGAJ
vs.
Supreme Court Judgment Pkl.nr. 61/07 of 24 November 2008
Supreme Court Judgment No. Ap.nr. 510/2007 of 26 March 2008

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Snezhana Botusharova, Judge
Robert Carolan, Judge

Ivan Čukalović, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjylieta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge,

The Applicants

1. The Applicants are Demë Kurbogaj from Peja represented by Mr. Zenel Mekaj a practicing lawyer in Peja and Besnik Kurbogaj from Peja represented by Mr. Mentor Neziri a practicing lawyer in Pristina.

The Challenged decisions

2. In their referral the Applicants challenged the Judgments of the Supreme Court of 24 November 2008[1] and of 26 March 2008[2].

Subject Matter

3. The applicants claim that the trial was not objective, the facts were not fairly assessed. They also claim, the decision was based on a prejudice created by a coincidence and pressure was exerted on the witnesses. Therefore, they conclude, the trial was not fair and there was a "violation of Article 6 of the European Convention on Human Rights, including the Constitutional Framework (it has been in force at that time) and the Criminal Codes of Kosovo."

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Articles 20 and 22 paragraphs (7) and (8) of 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).

Summary of the proceedings before the Court

5. On 2 March 2009, the Referral was lodged with the Constitutional Court. On 7 October 2009, the Applicants were invited to clarify and

[1] Case No. Pkl. nr 61/07
[2] Case No. AP.nr.510/2007

supplement the referral. On 22 October 2009 and 2 November 2009, the Applicants' representatives submitted their responses.

6. The appointed Judge Rapporteur Almiro Rodrigues submitted a preliminary report concerning facts, admissibility and grounds of the referral, in accordance with Article 22(3) of the Law.

7. On 2 December 2010, the Review Panel, composed of the Judges Robert Carolan (Presiding), Kadri Kryeziu and Gjylieta Mushkolaj acting under Article 22.6 of the Law, adjudicated the Applicants' referral.

The facts

8. On 13 April 2007, the District Court in Peja[3] found the Applicants Demë Kurbogaj and Besnik Kurbogaj guilty for having committed the criminal offence of robbery and other connected criminal acts and sentenced them with 4 (four) years imprisonment. The Defense Counsels of Demë Kurbogaj and Besnik Kurbogaj appealed that decision to the Supreme Court.

9. On 26 March 2008, the Supreme Court rendered the judgment[4], upholding the appeal of the Prosecution and refusing as unfounded the appeals of the defense. The Supreme Court decided, among other legal issues, to amend the legal qualification of the offence, to find the Applicants guilty and to sentence them with imprisonment of 7 (seven) years each. On the other side, the Supreme Court annulled the first instance decision on criminal offense of attempted aggravated murder and returned it for a retrial. Meanwhile, the Defense Counsels of the Applicants filed with the Supreme Court a request for protection of legality against the judgments of the District Court and the judgment of the Supreme Court.

10. On 24 November 2008, the Supreme Court[5] refused the requests for protection of legality in relation to the criminal offence of robbery and rejected as inadmissible the part of request in the part regarding the criminal offence of attempted aggravated murder that was returned for a re-trial.

The Applicants' allegations

11. The applicants alleged that the trial against them was not fair because "it has not been objective; the facts of the case have not been fairly assessed;

[3] In the case No. P.Nr. 234/06
[4] No. Ap.nr.510/2007
[5] By its judgment Pkl.nr.61/07

it has been decided on a prejudice created by coincidence; pressure has been exercised on the witness." According to the applicants there has been "violation of Article 6 of the European Convention on Human Rights, including the Constitutional Framework (it has been in force at that time) and the Criminal Codes of Kosovo."

12. In his written submission submitted on 20 October 2009, Zenel Mekaj, the lawyer of the Applicant, Demë Kurbogaj, clarified the referral alleging, , that the Applicants did not commit the offense. He alleged that it was coincidence that the applicants were found near the location where a police operation was taken. He further alleged that the Applicants were maltreated by the police and that the police and the Prosecution has threatened a witness to testify in favor of the charges. Consequently, it was stated that Article 31 of the Constitution (the right to fair and impartial trial) has been violated.

13. On 2 November 2009, Mentor Neziri, the lawyer of the Applicant Besnik Kurbogaj submitted his written submission and, pointed out, , that the Supreme Court made several violations of both Law on Criminal Procedure Code and the Criminal Code. He emphasized, *inter alia*, that the judgment was based on unacceptable proof; the testimony of Albion Lajçi, who repeated many times that he was under duress and maltreated by the police. Consequently, according to him there was a violation of Article 403 1.8 of the Criminal Procedure Code. It was further stated that the Supreme Court also violated the Criminal Code, while wrongfully applying Article 256.1, in connection with its Article 23, as the legal elements of the criminal offense definition were neither[6] fulfilled, nor the Supreme Court justified the decision on requalification of the criminal offense. Thus, it was concluded, the Supreme Court didn't take into account Article 3.2 of the Criminal Procedure Code. He also claimed that, during the proceedings, different procedural violations mainly by the Prosecutor in courtroom, were committed and the Accused's personal integrity was violated as well as their human rights were not respected. He finally concluded that Articles 21, 23, 27, 30 and 31 of the Constitution were violated.

Assessment of the Admissibility of the Referral

14. In order to be able to adjudicate the Applicants' Referral, the Court need first to examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution that are further specified in the Law on the Constitutional Court and the Rules of Procedure.

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[6] As stipulated by Article 22.2 of the Law.

15. Moreover, the applicants must[7] submit a succinct statement of facts and accurate clarification of the rights that have been violated, indicating the concrete act of public authority that is subject of challenge and the relief sought. Finally the Applicants have t attach necessary supporting information and documents.

16. As it was already stated, the Applicants stated that "Article 6 of the European Convention on Human Rights, the Constitutional Framework (it has been in force at that time) and the Criminal Codes of Kosovo were violated", because "the trial was not objective, the facts were not fairly assessed, the decision was based on a prejudice created by a coincidence and pressure was exerted on the witnesses".

17. More precisely, the Applicants stated mainly that they did not commit the offense (a), the trial was not fair (b), the decision was based on a prejudice (c), they were maltreated by the police (d), pressure was exerted on the witness Albion Lajçi and the Supreme Court ignored his testimony (e), and judge Riza Loci did not participate in the session (f). They conclude that Articles 21, 23, 27, 30 and 31 of the Constitution were violated, as different procedural violations were committed and the personal integrity of the Accused was violated, as well as their human rights were not respected.

(a). They did not commit the offense

18. With regard to the Applicants allegations that they did not commit offence, it should be recalled that Constitutional Court does not have jurisdiction to adjudicate such a complaint.

19. Indeed, the Constitutional Court of Kosovo does not have an appellate jurisdiction and can not intervene on theory that such courts have made a wrong decision or erroneously assessed the facts. The role of the Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and can, therefore, not act as a "fourth instance "court (see, *mutatis mutandis*, i.a., Akdivar v. Turkey, 16 September 1996, R.J.D, 1996-IV, para. 65).

(b) The trial was not fair

20. The Applicants further argue that trial against them was not fair. The Constitutional Court considers that the allegation is only a conclusion which has not been proven. The Constitutional Court cannot guess which right in Article 6 of the European Convention on Human Rights was

[7] In accordance with Article 48 of the Law

violated, and how and why it was violated. The Applicants suggestions to the Constitutional Court to " see the case files, where the abovementioned violations can be found"[8] does not fulfil such a gap. In fact, it is not up to the Court to replace the Applicants in noting the facts and building the argument with regard to alleged violation Article 6 of the European Convention on Human Rights.

(c) The decision was based on a prejudice

21. The Applicants also claim that "the trial was not objective, the facts were not fairly assessed, and the decision was based on a prejudice created by a coincidence".

22. The Constitutional Court notes that according to the Supreme Court's judgment[9] the Applicants based their appeal "on the essential violations of provisions of the criminal procedure that are closely related to the ones for wrongful and incomplete assessment of factual situation and violation of the criminal law". No allegation on a specific constitutional law violation was made. The Supreme Court found that "the appeal allegations that the factual situation in this criminal matter is incomplete or wrongfully verified are not substantiated, because all the circumstances of the case have been verified properly and there is no doubt left in it".

23. Also in its decision on the request of protection of legality[10], the Supreme Court concluded that "the appealed judgments are not based on prejudice but on evidence, which have been assessed one by one and in conjunction with each other, whereas the content of the judgments provides for sufficient, clear and convincing reasoning, which are approved by this court without any doubt".

24. As it was stated earlier, the Constitutional Court of Kosovo does not have an appellate jurisdiction and can not intervene on basis that courts allegedly have made a wrong decision or erroneously assessed the facts (see, para. 19 above).

(d) They were maltreated by the police

25. The Applicants attached to the referral a letter, addressed namely by the Defence Counsel Zenel Mekaj to the Regional Police of Peja, informing that "on 13 March 2006, officers of the Kosovo Police Service when

[8] As stated in page 3 of the Referral
[9] Ap.nr 510/2007
[10] (PKL.nr 61/07 of 24 November 2008

arresting the defendants Demë and Besnik Kurbogaj, have beaten them so much, as to cause serious injuries, consequences of which are present even nowadays"[11]. They also notified that they "have raised criminal charges before the Public Prosecution of Kosovo, against NN Officers of the Kosovo Police Service, due to criminal offence of Mistreatment in Exercising Duties". That letter in itself does not prove the allegation. Furthermore, the Applicants didn't submit any information whatsoever on the final result on the "criminal charges before the Public Prosecution of Kosovo, against NN Officers of the Kosovo Police Service".

26. That means that either there is no evidence to support the alleged violation or the remedy is not exhausted yet.

(d) Pressure was exerted on the witness Albion Lajçi and the Supreme Court ignored his testimony

27. The Applicants allege that the police and the Prosecution have threatened witnesses to testify in favor of the charges, which even happened in a hearing when the police ordered to handcuff a witness in the hearing and sent them to the police station. They further point out that "the Supreme Court ignored the testimony of Albion Lajçi, repeating many times that he was under duress and maltreatment of the police", and thus the Supreme Court violated the Criminal Code and the Criminal Procedure Code.

28 The allegation that the police and the Prosecution have threatened witnesses to testify in favor of the charges, which even happened when the police ordered to handcuff the witness in the hearing and sent them to the police station, is not substantiated with any attached evidence to the referral. In addition, neither in the attached decision of the District Court of Peja nor in the decisions of the Supreme Court any reference to the event can be found. On the other side, there is nowhere mentioning of any objection made in the hearing to the alleged violation eventually occurred and, if any, what was the remedy.

29. Therefore, the referral does not attach the necessary supporting information and documents to prove the allegation. Apparently the applicant didn't actually object to the violation and therefore waived the right of invoking now such a violation if any.

30. The Applicants further claimed that the content of the testimony of Albion Lajçi was ignored by the Supreme Court. The defense had already alleged in the appeal before the Supreme Court that the testimony of

[11] Letter dated "Peja 17 March 2006

Albion Lajçi, which "was inserted during the procedure and at the judicial trial, (...) can not be used as evidence in which the punitive judgment would be substantiated"[12].

31. The Supreme Court, in its decision on the request for protection of legality concluded that "the case file and the appealed judgments show that both the first instance and second instance court gave legal reasons on all of their decisive facts, which are substantiated in just assessment of many evidence administered at the judicial trial". No arbitrariness or unreasonableness is found on the conclusion and no specific constitutional law violation was invoked by the applicants.

32. In relation to the testimony of Albion Lajçi, the Supreme Court further established that "the appealed judgments are not based exclusively on the statements of the witness Albion Lajçi, as alleged in the request for protection of legality of the convicted Besnik Kurbogaj and as alleged without any grounds that violence was used against this witness in order to make him change his statement in relation to the sale of his vehicle to convicted Demë Kurbogaj"[13].

33. As a matter of fact, the Supreme Court took note of the submissions made by the applicants to the proceedings, took them into consideration and gave reasons for its decisions. Therefore, the Constitutional Court does not intervene where infringements of procedural law, if any, have been remedied at the instance of appeal and no good cause is made on a specific constitutional law violation by the applicants.

(e) Participation of Judge Riza Loci in the session

34. The Defense Counsel of Demë Kurbogaj maintained, in the request for protection of legality before the Supreme Court, that "the judgment of the first instance court contains essential violation of provisions of the criminal procedure", namely because "although I did not participate at the session of the court panel of the Supreme Court, I do not believe that the panel member Riza Loci whose name appears in the judgment participated in the session, as he was ill at the time".

35. The argument was used before the Supreme Court which concluded[14] that "the allegations that judge Riza Loci did not participate at the session of the panel are unfounded and without arguments". The Supreme Court considered that "the allegations from the request for protection of

[12] See Ap.nr.510/2007 of the Supreme Court
[13] See again Supreme Court, PKL.nr.61/07, of 24 November 2008)
[14] In the Decision PKL. Nr 61/07 of 24 November 2008)

legality, that Riza Loci "was not present" are not substantiated". Furthermore, the Supreme Court also took into account that "the defense counsel of convicted Besnik Kurbogaj only presented assumptions in relation to the issue of non presence of Riza Loci, by alleging that "...based on the evidence in my possession judge Riza Loci was not present at the session".

36. On the other side, the Supreme Court session "was followed by the defense council (sic) of the convict Besnik Kurbogaj, attorney at law Mentor Neziri, and the records from the session of the second instance court[15], indicate that the presiding judge has communicated the composition of the court panel, which included Mr. Riza Loci as a member of the trial panel who is present. The attorney at law Mentor Neziri had no objections in this matter"[16].

37. Again, the Supreme Court not only was aware of its being active in an area that is of relevance with regard to fundamental rights, but also took note of the submissions made by the applicants to the regular proceedings, took them into consideration and gave reasons for its decisions.

Conclusion on admissibility

38. It appears consequently that the Applicants did not describe the relevant facts, did not ground the allegations that the right to a fair trial was violated and the referral does not accurately clarify precisely what rights and freedoms they claim to have been violated.

39. The Court finds, therefore the Applicant failed to demonstrate that their right to a fair and impartial trial have been violated and that their complaints were procedurally and substantively justified.

40. Moreover, the Court considers that there is nothing in the Referral which indicates that the Courts hearing the case lacked impartiality or that the proceedings were otherwise unfair. The mere fact that the Applicants are dissatisfied with the outcome of the case cannot of itself raise an arguable claim of a breach of Article 31 of the Constitution (see *mutatis mutandis* judgment ECHR Appl. No. 5503/02, Mezotur-Tiszazugi Tarsulat v. Hungary, Judgment of 26 July 2005.

41. This finding is based solely upon the Referral and the evidence submitted in support of the Referral. If additional evidence that could have not been reasonably discovered at the time this Referral was filed

[15] Ap. Nr. 510/2007 dated 26.03.2008
[16] As it is written in the Supreme Court decision Pkl.nr.61/07, dated of 24 November 2008

with the Court but which could substantially affect the Court's conclusion is subsequently presented to this Court, the Court would and could consider a request to re-consider this case.

42. In these circumstances, the Applicants cannot be considered to have fulfilled the requirements for admissibility of the Referral.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 49 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 shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues, signed	Prof. Dr. Enver Hasani, signed

Dedë Gecaj vs. Decision PKL-KZZ 76/08 of the Supreme Court

Case KI 22/09, decision of 20 May 2010
Keywords: Individual referral, extradition, *ne bis in idem,* human rights, inhuman or degrading treatment.

The applicant filed a referral, thereby claiming that his constitutional rights have been infringed by the decision of the Supreme Court of Kosovo, which found the agreement on extradition between the UN Mission in Kosovo and Switzerland to be valid, therefore to extradite the applicant to Switzerland. The applicant claimed that the judgment of the Supreme Court violated the principle *ne bis in idem*, as provided by Article 34 of the Constitution, "no one can be tried more than once for the same criminal offence". This argument is grounded by the applicant upon the fact that the applicant was found guilty by the Supreme Court of Serbia for the same offence, although he did not serve sentence imposed on him by such decision. He alleges that such a decision violated the basic principles of the EHCR, the European Convention on Extradition, and principles of the Law on Criminal Procedure. Before a merit-based review of this case, the Court had earlier decided to reject the request of the applicant for interim measures.

The Court decided to reject applicant request as inadmissible, thereby reasoning that the extradition to Switzerland is not in contradiction with the agreement, and that the applicant has not submitted any evidence to demonstrate that such a transfer to Switzerland would violate fundamental principles of human rights, or that would subject him to inhuman treatment.

Pristina, 20 May 2010
Ref. No.: RK 22/10

RESOLUTION ON INADMISSIBILITY

Case KI 22/09
Dedë Gecaj
vs.
Decision No. PKL-KZZ 76/08 of the Supreme Court of Kosovo dated 6 April 2009

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
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Dedë Gecaj, represented in the proceedings before the Constitutional Court by Kolë Krasniqi, a practicing lawyer in Peja.

Challenged decision

2. In his Referral, the Applicant challenges Decision No. PKL-KZZ 76/08 of the Supreme Court of Kosovo dated 6 April 2009.

Subject Matter

3. The Applicant is wanted in Switzerland for allegedly having committed criminal offences in violation of applicable Swiss law. He, however, absconded, but was arrested in Serbia, where he was tried for some of the offences. Pending the decision of the Supreme Court of Serbia on his request for revision, he was released from custody. After the Supreme Court of Serbia confirmed his conviction on 22 March 2002, the Applicant did not turn himself in to serve the remainder of his sentence.

4. The Applicant was arrested in Kosovo in May 2006, but released pending the proceedings initiated by the Swiss authorities with the United Nations Mission in Kosovo to have him transferred to Switzerland. An Agreement to transfer him to Switzerland was entered into, but challenged in court by the Applicant. On 6 April 2009 the Supreme Court of Kosovo decided, in the last instance, that the Agreement was valid. The Applicant alleges that his transfer to Switzerland would expose him to treatment contrary to the Constitution and human rights instruments.

Legal basis

5. Article. 113 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).

Summary of the proceedings before the Court

6. On 22 June 2009, the Applicant filed a Referral with the Constitutional Court, which, on 17 September 2009, he supplemented with a request for interim measures, specifically, the suspension of the procedure for his transfer to Switzerland. On 15 December 2009, the Court decided to reject the Applicant's request for interim measures.

Summary of facts

7. On 11 January 1999 the teacher of the Applicant's daughter was murdered in St. Gallen, Switzerland. According to the Swiss authorities, the teacher, who had become aware of the fact that the Applicant sexually abused his daughter, was killed by the latter in order to eliminate him as a witness. The Applicant absconded and is now being sought by the Swiss authorities for allegedly having committed the criminal offences of murder; possibly intentional homicide; multiple sexual acts with a child; infliction of multiple bodily injuries; multiple rape; multiple coercion; false accusation and/or incitement thereto; violence and threats against authorities and officers; and punishable preparatory act for intentional homicide or abduction.

8. On 25 February, 1999 the Applicant was arrested in Gjakova and kept in detention on remand awaiting his trial before the District Court of Peja. After Security Resolution 1244 had come into effect in 1999 and the United Nations Mission in Kosovo (UNMIK) had assumed, inter alia, the administration of justice, the Supreme Court of Serbia decided to entrust the case to the District Court in Leskovac, which, on 7 December 2000, convicted the Applicant for murder and sentenced him to 4 years imprisonment. The Applicant appealed from this decision to the Supreme Court of Serbia, which released him pending the appeal proceedings.

9. On 28 March 2002, the Supreme Court of Serbia confirmed the District Court's judgment. It further decided, on 28 May 2003, to reduce the Applicant's sentence to 3 years and 6 months and to take into account the period he already spent in detention on remand. The Applicant did not turn himself in to serve the remainder of his sentence, but remained in hiding.

10. On 19 May 2003, the Swiss authorities issued an arrest warrant against the Applicant on the basis of the above criminal acts (see para. 7) and, on 22 February 2006, concluded an agreement with UNMIK for his transfer to Switzerland in the event that he were to be arrested. On 4 May 2006 he was re-arrested in Kosovo, but released by the trial judge in Peja the same day. On 7 May the Applicant's detention on remand was ordered by

the District Court of Peja, but he was not re-arrested until 13 August 2007. He was released from detention on remand on 17 August 2007.

11. On 20 August 2007, a new Agreement for the Applicant's transfer to Switzerland was concluded between the Swiss authorities and UNMIK. By decision of 5 November 2007, the District Court in Peja confirmed the Applicant's transfer. On 28 March 2008, the Supreme Court of Kosovo upheld the Applicant's appeal against the District's Court's confirmation and rejected the request for his transfer to Switzerland as unfounded. The Public Prosecutor submitted a request for protection of legality against this ruling on 24 July 2008.

12. By decision of 6 April 2009, the Supreme Court granted the Public Prosecutor's request for protection of legality and ruled that the transfer of the Applicant to Switzerland on the basis of the Agreement concluded between the Swiss authorities and UNMIK on 20 August 2007 was still valid, pursuant to Article 145 (Continuity of International Agreements and Applicable Legislation) of the Kosovo Constitution.

13. Referring to the "procedural history ", the Supreme Court held that the Applicant had been condemned for the crime of murder by a Serbian court and that "the decision cannot be taken into consideration in the perspective of the application of the principle of the "ne bis in idem", since the transfer Agreement clearly establishes that the transfer will not be granted, if the Applicant "has been acquitted or convicted by final judgment of a Court in Kosovo of the criminal offence for which the transfer is sought (Art. 5.g of the said Agreement), with exclusion of judgments of non-domestic courts".

Applicant's allegations

14. The Applicant emphasizes that his criminal case was adjudicated in last instance by the Supreme Court of Serbia of 28 March 2002. Therefore, the decision of the Kosovo Supreme Court of 6 April 2009 violates:

- Basic principles of the ECHR, the Universal Declaration of HR, the Constitution of Kosovo, and public international law;
- European Convention on Extradition of 13 December 1957 and its protocols of 1975 and 1978;
- Principles of criminal procedural law;
- Articles 451.1, 452.3, and 457.2 of the Provisional Criminal Procedure Code of Kosovo (PCPCK).

15. Moreover, the decision of the Supreme Court of Kosovo of 6 April 2009 violates Article 517.9 PCPCK, which requires that the transfer of a person to a foreign jurisdiction is only allowed, if there is no real risk that the person, whose transfer is sought, will face inhuman or degrading treatment or punishment.

16. According to the Applicant, the Swiss authorities have *"proofed unlawful, discriminating, degrading and revengeful attitude, only because of his national background, respectively the hate against foreigners"*.

Assessment of admissibility of the Referral

17. The Applicant complains of a violation of the principle "Ne Bis In Idem", as laid down in Article 34 of the Constitution, which provides that "No one shall be tried more than once for the same criminal act", a principle which, in the Court's opinion, is universal. However, the issue is not whether the Applicant would be retried by the Kosovo courts, but, as he himself clearly indicated, whether he would be retried in Switzerland for the same criminal acts as for which he had already been tried by the Supreme Court of Serbia in the last instance. In these circumstances, it is up to the Applicant to raise this issue with the Swiss authorities, when transferred to Switzerland, and request them to apply the above principle.

18. Moreover, the Agreement enabling the Applicant's transfer to Switzerland was concluded between the Swiss authorities and UNMIK on 20 August 2007. The validity of this Agreement was confirmed in last instance by the Supreme Court of Kosovo on 6 April 2009, ruling that the Applicant "has been condemned for the crime of murder by a Serbian Court " and that "the transfer will not be granted, if the resident has been acquitted or convicted by final judgment of a court in Kosovo of the criminal offence for which his transfer is sought (Article 5(g) of the Agreement)", with the exclusion of judgments of non-domestic courts".

19. The Court, therefore, finds that, since the criminal proceedings against the Applicant terminated with the final adjudication of his case by a non-domestic court, i.e. the Supreme Court of Serbia, the Agreement concerned cannot be considered to violate the above principle.

20. The Applicant also complains that the decision of the Kosovo Supreme Court of 6 April 2007, confirming his transfer to Switzerland, violates Article 517.9 of the Provisional Code of Criminal Procedure of Kosovo (PCPCK), which forbids a transfer to a foreign jurisdiction where the Applicant would risk to be exposed to inhuman or degrading treatment

or punishment. In his opinion, the Swiss authorities have *"proofed unlawful, discriminating, degrading and revengeful position, only because of his national background, respectively the hate against foreigners"*.

21. In this connection, the Court makes reference to the judgment of the European Court of Human Rights in the Soering Case (Soering v. United Kingdom, series A, No. 161, Appl. No. 14038/88), in which the ECrtHR held that extradition might be refused in circumstances, where the applicant has suffered or risks suffering a flagrant denial of a fair trial in the requesting state.

22. However, the Court finds that the Applicant has not submitted any evidence whatsoever that his transfer to Switzerland would violate basic principles of human rights as guaranteed by the international instruments, mentioned by him, or that he would be submitted by the Swiss authorities to treatment contrary to Article 517.9 PCPCK, requiring that the transfer of a person to a foreign jurisdiction is only allowed, if there is a real risk that the person, whose transfer is sought, will face inhuman or degrading treatment or punishment.

23. It follows that the Applicant has not fulfilled the requirements for the submission of a Referral as laid down in Article 22.1 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law, and Section 54(b) of the Rules of Procedure, unanimously, in its session of 20 May 2010:

DECIDES

I. TO REJECT the Referral as inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr. Gjylieta Mushkolaj, signed	Prof. Dr. Enver Hasani, signed

Spartak Dervishi vs. Decision P. No. 74/2002 of the Municipal Court in Gjakova and Decision AP. No. 78/07 of the District Court in Peja

Case KI 04/09, decision of 21 May 2010
Keywords: individual referral, right to fair and impartial trial.

The applicant filed a referral requesting quashing of the sentence of seven months of imprisonment, pronounced for committing three criminal offences of robbery, on the grounds that the first instance court decision was not served upon him, and that his lawyer did not have sufficient time to prepare defence, and that the Court did not take into account the medical evidence showing that he suffers from "paranoid psychosis".

The Constitutional Court decided to reject applicant's referral as inadmissible, reasoning that the referral does not clarify or specify the manner in which his constitutional rights were violated. Further, the Court decided not to take into account the medical evidence used as grounds by the applicant, because such evidence was not submitted during preliminary proceedings, and regardless of this, the Court finds that such evidence is not convincing and it would not suffice to quash the pronounced sentence.

Pristine, 21 May 2010
Ref.no: RK 18/10

Resolution on Inadmissibility
in
Case No. KI. 04/09
Applicant
Spartak Dervishi
vs.
The Decisions of the Municipal Court of Gjakova, Decision No. P.no.74/2002 and of the District Court of Peja, Decision No. Ap.no.78/07

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

Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Unanimously adopts the following Resolution on inadmissibility in relation to the Referral:

The Applicant

1. The Applicant is Mr. Spartak Dervishi, residing in Gjakova municipality represented by Lawyers, Avdi Rizvanolli, and Teki Bokshi, both from Gjakova.

The Challenged Decisions

2. The Municipal Court of Gjakova, Decision No. P.no.74/2002 and of the District Court of Peja, Decision No. Ap.no.78/07

Subject Matter

3. The Applicant maintains that his conviction for three offences for robbery under Article 253.1.1 of PCCK (Temporary Penal Code of Kosovo), for which he was sentenced to seven months imprisonment, should be set aside on the basis that he did not receive the Decision of the First Instance Court, that his lawyer did not have enough time to prepare the defence of his case and that new evidence should be taken into account. That new evidence is that he suffers or suffered from "Paranoid Psychosis".

Legal basis

4. Art. 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article. 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Law), and Section 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Summary of the proceedings before the Constitutional Court

5. The Application was lodged with the Constitutional Court on 20 February 2009. The Judge Rapporteur appointed by the President of the Court was Judge Iliriana Islami. A Review Panel of the Court was appointed comprising Judge Altay Suroy, Chair, Judge Ivan Čukalović and Judge Almiro Rodrigues. On 9 February 2010 the Review Panel examined the Applicant's Referral and decided on the admissibility thereof.

The facts

6. The facts of the case were as follows:

    1. The Applicant was convicted in Municipal Court of Gjakova on 11 February 2005 of the commission of three criminal offences of Aggravated Robbery,

    2. Two of the offences were alleged to have been committed on the 28 December 2001, and one other Robbery offence on the 24 December 2001

    3. According to the Verdict of the he was sentenced to seven months in prison; his time spent in detention from 30 December 2001 to 24 January 2002 was be taken into consideration and execution of the Decision No. P.no.74/2002 dated 11 October 2007 comes into full effect immediately for the serving the sentence.

    4. An Appeal was lodged to the District Court in Peja through his lawyers on 20 June 2007.

    5. The District Court in Peja on 9 April 2008 refused the appeal as unfounded and upheld the Decision of the Municipal Court.

    6. On a further appeal presented to the District Court on 9 April 2008, new evidence was presented which maintained that the Applicant was legally irresponsible, according to new medical evidence which issued from a psychiatric Hospital where he was treated from 16 June 999 to 3July 1999 and where he had been diagnosed with "paranoid psychosis".

    7. The Municipal Court of Gjakova issued an order dated 26 January 2009 obliging the Applicant to appear in Court in order to serve his sentence given, under penalty of arrest by the Police.

Proceedings before the Constitutional Court

7. An Application was presented on 23 February 2009 to the Constitutional Court, KI 04/09, challenging the constitutionality and legitimacy of the Decisions of the Municipal Court of Gjakova, Decision No. P.no.74/2002 and of the District Court of Peja, Decision No. Ap.no.78/07

8. On 20 October 2009, the District Court of Peja responded to a request from this Court for information on the case and enclosed with the response a Verdict from the Supreme Court in the Applicant's case dated 28 April 2009.

Assessment of the Admissibility of the Referral

9. The Applicant states that Article 31 of the Constitution is the basis for his referral, however, he did not specify or particularise how Article 31 supported his claim. Article 31 of the Constitution sets out the right to a fair and impartial trial. Article 113.7 of the Constitution of Kosovo states:

10. All individual persons are authorized to file complaints to public authorities about their violations of human and freedom rights, established and guaranteed by the Constitution, but only after exhausting all the legal means foreseen by the Law.

11. Article 48 of the Law on Constitutional Court of the Republic of Kosovo states:

    "The applicant of the request is obliged to mention and clearly define which rights and freedoms have been violated and which relevant Act of the public authority is also contested."

12. In the Referral the Applicant has not mentioned or clearly defined which rights and freedoms he alleges have been violated.

13. The medical evidence which the Applicant attempts to rely on refers to a diagnosis and period of treatment prior to the commission of the offences with which he was charged. As pointed out in the Decisions of the Courts which heard his case his medical condition was not raised by him in his defense at his trial and the evidence now produced is not so compelling as to allow him to rely on it to challenge his conviction any further.

FOR THESE REASONS

14. The Constitutional Court, pursuant to Art. 113(7) of the Constitution, Art. 20 of the Law, and Art. 55 of the Rules of Procedure, , in its session of 21 May 2010:

DECIDES

I. TO REJECT the Referral as inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Art. 20(4) of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr. Iliriana Islami, signed	Prof. Dr. Enver Hasani, signed

Afrim Ajet Haxha vs. the District Public prosecutor

Case KI 50/09, decision of 13 June 2010
Keywords: individual referral, judicial protection and use of legal remedies,

The Applicant filed a referral against the District Public Prosecutor in Mitrovica who according to him has failed to prosecute the alleged perpetrators for committing a theft in his house despite the fact that the applicant reported the case. The applicant alleges that he had sent many letters to different institutions but received no response, and thus he addressed the case with the Court.

The Constitutional Court decided to reject the case as inadmissible with a reasoning that the applicant did not exhaust legal remedies foreseen by the law, by failing to claim for compensation from the alleged perpetrators of the theft and he did not prove that he was precluded from making such a claim.

Pristina, 13June 2010
Ref. No.: RK 23/10

RESOLUTION ON INADMISSIBILITY
in
Case No. 50/09
Applicant
Afrim (Ajet) Haxha
vs.
Opposing Party
District Public Prosecutor, Mitrovica

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 Čukalovič, Judge
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant:

1. The Applicant is Mr. Afrim (Ajet) Haxha from the Municipality of Mitrovica.

The Opposing Party:

2. The Opposing Party is the District Public Prosecutor of Mitrovica.

Subject Matter

3. Applicant alleges that on 22 and 23 March 1996, police forces surrounded his house and broke into it. He maintains that certain policeman, in concert with other named persons, stole personal property from his residence.

4. The Applicant is requesting that the District Court in Mitrovica find those people guilty of crimes and is requesting that they be sentenced to the maximum penalty for their alleged crimes and that his family (Haxha) be compensated in the amount of 8000 Deutsch Marks, plus interest from the date of the alleged crime.

5. The Applicant alleges that all of the appropriate public authorities have failed to prosecute the alleged perpetrators for their crimes. On February 20, 2006, he requested the District Court of Mitrovica and the District Prosecutor to prosecute these individuals for the crimes they allegedly committed. On October 31, 2008, he demanded that the Kosovo Public Prosecutor prosecute these individuals. On October 31, 2008, he also requested the Supreme Court of Kosovo to intercede in his case. He also asked the Minister of Justice, to intervene and to order the District Prosecutor and the District Court of Mitrovica to prosecute these individuals.

6. In a letter accompanying his referral to this Court, the Applicant stated that he had complained everywhere but that no one had given him any reply. He stated that the Constitutional Court should solve his problem or he would have to take the law into his own hands. He maintained that the majority of the letters he had sent to institutions had not been responded to and that the Court was his last recourse.

7. The Applicant appears to be alleging that his right to judicial protection and to an effective legal remedy has been violated pursuant to Article 54 of the Constitution.

8. There has been no response by any judicial or public authority of Kosovo other than a letter from the Ministry of Justice, on 24 October 2008, stating that the Ministry of Justice was not competent to act on Applicant's claim.

Legal basis

9. Article. 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article. 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of 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.

Assessment of the Admissibility of the Referral

10. *Article 6 of the Provisional Criminal Code of Kosovo* authorizes an appropriate public prosecutor of Kosovo to initiate a criminal proceeding if there is reasonable suspicion that a person may have committed a crime, see *Article 6 (3).* By their failure to commence any criminal proceedings against anybody in response to the Applicant's complaint, it is reasonable to infer that the appropriate public prosecutors concluded that they did not have reasonable suspicion that a person may have committed a crime or that there was not sufficient evidence to maintain a prosecution. If the public prosecutor decides that there are no grounds to initiate or continue a criminal proceeding, his or her role as a prosecutor may be assumed by the injured party see *Article 6 (4).* There is no evidence that the Applicant, as an injured party commenced any criminal proceedings against anybody for the incident of 22 and 23 March, 1996.

11. It appears that the Applicant is alleging that the suspects in this case committed the crime of *Aggravated Theft in violation of Article 253 of the Provisional Criminal Code of Kosovo.* If convicted, the maximum penalty that could be imposed for such a crime is 5 years in prison. The Statute of Limitations for when a crime of this nature can be prosecuted is 5 years; see *Article 90 of the Provisional Criminal Code of Kosovo.* Therefore, the time limit for any prosecution to have been commenced against any suspects in this case had probably expired by 21 or 22 March, 2001 (five years from the day when the alleged crime was committed). Therefore, as a matter of law, any criminal prosecution would now probably be time barred by the applicable statute of limitations law.

12. *Article 49 of the Law on the Constitutional Court of the Republic of Kosovo* requires that the referral be filed with the Constitutional Court within four months of the act or omission creating a violation of the Applicant's constitutional rights. In this case, if there was a constitutional violation by the appropriate authorities refusing to prosecute, that violation occurred when the statute of limitations expired on or about 21 or 22 March, 2001. The Applicant first attempted to file his referral with this Court on or about 5 October, 2009, well beyond the four month period allowed by Article 49.

13. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this connection, the Court refers to Article 113.7 of the Constitution, which provides: "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."

14. 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. This is an important aspect of the subsidiary character of the Constitution. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). 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 is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).

15. This Court applied this same reasoning when it issued a Decision on 27 January 2010 on inadmissibility on the grounds of non exhaustion of remedies in the case of AAB-RIINVEST University L.L.c., Pristina vs. Government of the Republic of Kosovo, Case No. KI. 41109.

16. The Applicant has not addressed whether he attempted to recover damages from the alleged perpetrators in a civil proceeding. He has also not alleged whether he was precluded from making such a claim. Therefore, he has not established whether he has exhausted all of his legal remedies as required by *Article 113, Section 7 of the Constitution of the Republic of Kosovo*.

17. It does not appear that the Applicant has exhausted all legal remedies provided by law either as a private prosecutor as an injured party or as a civil litigant in a civil proceedings to recover damages.

18. Article 48 of the Law on the Constitutional Court of the Republic of Kosovo 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."

19. The Applicant has not clarified what rights or freedoms he feels have been violated.

FOR THESE REASONS

20. The Constitutional Court, pursuant to Art. 113(7) of the Constitution, Art. 20 of the Law, and Art. 55 of the Rules of Procedure, unanimously, in its session of 13 June 2010:

DECIDES

I. TO REJECT the Referral as inadmissible.

II. This Decision shall be notified to the Parties, the President of the Supreme Court and the Minister of Justice and shall be published in the Official Gazette, in accordance with Art. 20(4) of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of he Constitutional Court**
Robert Carolan, signed	Prof. Dr. Enver Hasani, signed

Applicant X vs Decision No. 215/2006 of the Supreme Court, decision no. 741/2005 of the District Court, and Decision no. 217/2004 of the Municipal Court

Case KI 06/09, decision of 17 June 2010
Keywords: individual referral, right to fair and impartial trial.

The applicant filed a referral challenging judgments of the Supreme Court, District Court and Municipal Court, thereby claiming that her rights to a fair and impartial trial were violated, without providing any other argument.

The Constitutional Court decided to reject the applicant's referral as inadmissible, thereby reasoning that she failed to clarify or specify further the manner in which her constitutionally guaranteed rights were violated. Further, the Court found that the referral did not contain any fact to suggest that previous procedures were biased or unfair. According to the Court, the fact that the applicant is discontented with the outcome of the case is not an argument for violation of the Article 31 of the Constitution on fair and impartial trial.

Pristina, 17 June 2010
Ref. No.: RK 13/10

DECISION

Case No. KI. 06/09
Applicant X
vs.
Supreme Court Judgment Nr. 215/2006
District Court Judgment Nr. 741/2005
Municipal Court Judgment Nr. 217/2004

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

Applicant

1. The Applicant is a resident of Kosovo.

Challenged Decisions

2. The Applicant challenges the decisions of the Supreme Court (nr.215/206 of 10 June 2008), District Court (Ac.nr.741/2005 of 28 March 2006) in P. and Municipal Court (C.nr.217/2004 of 1 July 2005) in P..

Subject matter

3. The Applicant claims that her right guaranteed by Article 31 of the Constitution (right to a fair and impartial trial) has been violated.

Legal basis

4. Article 113 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of 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).

Summary of the proceedings before the Court

5. The Applicant submitted her Referral to the Constitutional Court on 15 June 2009. She requests not to have her identity revealed in the decision of this Court and that the communication should be done only by telephone.

6. On 18 February 2010, after having considered the Report of the Judge Rapporteur, Gjyljeta Mushkolaj, the Review Panel, composed of Judges Robert Carolan (Presiding), Snezhana Botusharova and Kadri Kryeziu, on the same date, recommended to the full Court to reject the case as inadmissible.

Facts

7. On 31 June 2004, the Applicant filed a lawsuit against Y with the Municipal Court in P., requesting the court to order the defendant to pay to her the amount of 30,000 Euros as compensation for non-material damages, on the ground that he had deceived her, when he told her he would marry her and had sexual intercourse with her, while

she was still a virgin. According to the Applicant, the defendant, despite his promise, married another woman and had, thus, violated her honor and dignity.

8. After having ordered a physical examination by a public medical institution in P., the Municipal Court rejected the Applicant's lawsuit as unfounded by decision of 1 July 2005. The Court reasoned that medical experts had not been able to scientifically explain the exact time of the sexual intercourse, during which she had lost her virginity, and that, therefore, the defendant's civil liability could not be established.

9. The Applicant appealed against this judgment to the District Court in P., stating that the Municipal Court had violated essential provisions of the Code of Civil Procedure; had erroneously and incompletely assessed the facts; and had erroneously applied the material law. In the Applicant's submission, the case, should, therefore, be retried.

10. By decision of 28 March 2006, the District Court in P. confirmed the judgment of the Municipal Court and rejected the Applicant's appeal as unfounded. The Court reasoned that the Applicant's arguments that the judgment of the Municipal Court was based on an erroneous and incomplete assessment of the facts and an erroneous application of the substantive law were unfounded. The Court further stated that the first instance court had rightfully applied the substantive law and determined that the defendant was not liable to pay compensation for non-material damages. The Court assessed that the judgment was comprehensive and reasoned in accordance with Article 354 (14) of the Law on Contested Procedure.

11. On 21 August 2006, the Applicant submitted a request for revision to the Supreme Court, arguing that both the first and second instance judgments were reached in violation of essential provisions of the contested procedure, without an assessment of the facts and while erroneously applying the substantive law.

12. The Applicant apparently wrote to the Ombudsperson, complaining that the Supreme Court had not taken a decision yet. She has not revealed the outcome of the communication between the Ombudsperson and the Supreme Court

13. On 10 June 2008, the Supreme Court rejected the Applicant's request for revision as unfounded since the revision could not be requested because of an erroneous and incomplete assessment of the factual situation.

Applicant's allegations

14. The Applicant complains in her Referral of a violation of Article 31 (the right to a fair and impartial trial) of the Constitution, without elaborating the issue any further.

Assessment of the Admissibility of the Referral

15. Initially, the Court would like to underline that it is not a court of appeal for other courts in Kosovo and it cannot intervene on the basis that such courts have issued a wrong decision or have erroneously assessed the facts. The role of the Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot therefore act as a "fourth instance" court (see, *mutatis mutandis*, i.a., Akdivar v. Turkey, 16 September 1996, R.J.D, 1996-IV, para. 65).

16. In order for the Court to be able to determine a possible violation of the rights guaranteed by the Constitution, it is necessary for the Referral to include a procedural and substantive justification and supporting information and documentation, in accordance with Article 22.1 of the Law and Article 29(1)(f) and (g) of the Rules of Procedure of the Court. Concerning the Applicant's complaint that the proceedings before the other courts had not been fair and impartial, the Court needs to examine whether the Applicant has fulfilled these admissibility requirements.

17. The Court finds, however, that the Applicant fails to demonstrate in her Referral that her right to a fair and impartial trial has been violated and that her constitutional complaint was procedurally and substantively justified.

18. Moreover, the Court considers that there is nothing in the Referral indicating that the courts hearing the case lacked impartiality or that the proceedings were otherwise unfair. The mere fact that the Applicant is dissatisfied with the outcome of the case cannot of itself raise an arguable claim of a breach of Article 31 of the Constitution (see *mutatis mutandis* Judgment ECHR Appl. No. 5503/02, Mezotur-Tiszazugi Tarsulat v. Hungary, Judgment of 26 July 2005).

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Section 54(b) of the Rules of Procedure, unanimously, in its session of 17 June 2010:

DECIDES

I. TO REJECT the Referral as inadmissible.

II. This Decision shall be communicated to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr.Gjyljeta Mushkolaj , signed	Prof. Dr. Enver Hasani, signed

Sevdail Avdyli vs. Judgment A. No. 533/2006 of 11 September 2006 and Judgment A. No. 353/2003 of 2 December 2006 of the Supreme Court

Case KI 13/09, decision of 17 June 2010
Keywords: individual referral, invalidity pension, right to social assistance.

The applicant filed a referral against the judgment of the Supreme Court of Kosovo, which confirmed the decision of the Ministry of Labour and Social Welfare, and the decision of Centre for Social Welfare of the Municipality of Podujeva, to reject applicant's right to invalidity pension and the right to social assistance. The applicant alleges that this decision violated his rights to invalidity pension and social assistance, not specifying any constitutional provisions.

The Constitutional Court decided to reject the referral as inadmissible, due to the fact that it was filed after the expiry of the deadline of four months as provided by Law on the Constitutional Court. Simultaneously, the Court found that even if the Court would extend its authority to review the referral, the Court would have rejected the referral as inadmissible, due to the reasoning that the applicant was offered numerous opportunities to present the case and challenge the interpretation of the law. Further, the Court found that it had not found any evidence that administrative proceeding that applicant went through were unfair or affected by arbitrariness. Ultimately, the Court underlined that the applicant had not offered any *prima facie* evidence to prove the violation of his constitutional rights.

Pristina, 17June 2010
Ref. No.: RK 25/10

RESOLUTION ON INADMISSIBILITY

Case No. KI 13/09
Sevdail AVDYLI
vs.
Supreme Court Judgment A. No. 533/2006 of 11 September 2006
and
Supreme Court Judgment A. No. 353/2003 of 2 December 2003

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President

Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Snezhana Botusharova, Judge
Almiro Rodrigues, Judge
Ivan Čukalović, Judge
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant, Sevdail Avdyli, is residing in the village Metehi, Municipality of Podujeva.

Subject matter

2. The Applicant claims that Judgment A. No. 533/2006 of the Supreme Court of 11 September 2006 which confirmed Decision No. 5004857 of the Ministry of Labour and Social Welfare, has violated his right to receive a disability pension. The Applicant also claims that Judgment A. No. 353/2003 of the Supreme Court of 2 December 2003, which confirmed Decision No. 809 of the Centre for Social Labour of Podujeva, has violated his right to social assistance.

Legal basis

3. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article 20 of 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).

Summary of the proceedings before the Court

4. The Applicant submitted his Referral to the Constitutional Court on 16 March 2009. On 17 March 2009 the Applicant was informed by the Provisional Secretariat of the Court that his case would be considered once the Constitutional Court becomes fully functional.

5. On 11 August 2009 the Constitutional Court informed the Supreme Court of Kosovo about the Applicant's case. On 12 November 2009 the Judge Rapporteur requested additional information from the Supreme Court. The Supreme Court has not sent any reply.

6. On 18 February 2010, after having considered the Report of the Judge Rapporteur, Kadri Kryeziu, the Review Panel, composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Gjyljeta Mushkolaj, on the same date, recommended to the full Court to reject the case as inadmissible.

Facts

7. It appears from the documents submitted by the Applicants that, in the past ten years, he initiated two different sets of administrative proceedings, i.e. proceedings relating to his request to receive a disability pension and proceedings relating his request for social assistance. None of the Applicant's proceedings were successful.

As regards the administrative proceedings relating to the Applicant's request for a disability pension:

8. On 1 January 2004 the Ministry of Labour and Social Welfare, Department of Pension Administration, initially approved the Applicant's application for a disability pension in the amount of 40 Euro per month. The Applicant was also informed that the decision would be reviewed after one year. Then, by Decision dated 29 September 2005, the same authority annulled the Applicant's pension benefits, because it found that Applicant's medical condition did not allow him to qualify for a disability pension. The Applicant then appealed this decision. On 6 May 2006 the decision was upheld by the Appeals Council on Disability Pensions within the Ministry of Labour and Social Welfare.

9. The Applicant then initiated administrative dispute proceedings before the Supreme Court. In its judgment of 11 September 2006 (No. 1561/2007) the Supreme Court decided that the Applicant's appeal and lawsuit were unfounded, since the Applicant did not fulfil the criteria of Article 3 of the Law on Disability Pensions. The Court based itself on the opinion of the doctor's advice issued on 29 September 2004, according to which the Applicant did not have a permanent disability. This medical finding was confirmed by the medical commission in the appellate procedure. Consequently, pursuant to Article 40 of the Law on Administrative Dispute, the Applicant's lawsuit was rejected.

As regards the administrative proceedings relating to the Applicant's request to receive social assistance:

10. With regard to the Applicant's request for social assistance, it appears from the documents that, on 15 August 2002, the Department of Labour and Social Welfare of the Ministry of Labour and Social Welfare initially approved Applicant's request granting him social assistance in the

amount of 64 Euro per month. The social assistance was granted for a limited period, i.e. from 1 August 2002 to 31 January 2003. Then, on 12 May 2003, the same authority rejected the Applicant's further request for social assistance arguing that "one of the family members did not satisfy one out of six criteria." The Applicant then appealed this decision.

11. The Institute of Social Policy of the Ministry of Labour and Social Welfare rejected the Applicant's appeal and reminded him that one of his brothers lived abroad and that in the Applicant's family there were several persons able to work. Therefore it was concluded that the Applicant is not entitled for social assistance. Against this decision the Applicant filed a lawsuit with the Supreme Court.

12. On 2 December 2003 the Supreme Court rejected the Applicant's lawsuit. The Court reiterated that it was established that the Applicant did not fulfil conditions foreseen by the Law on Social Protection and Social Assistance scheme approved by the Interim Administration of United Nations.

Applicant's claims

13. The Applicant complains, without specifying any particular provision of the Constitution, that his rights to a disability pension and social assistance have been violated.

Assessment of the Admissibility of the Referral

14. The Court notes that the Applicant filed the Referral with its Secretariat on 16 March 2009. However, Judgments A.No. 353/2003 and A.No. 533/2006 of the Supreme Court, which the Applicant submitted in support of his Referral, date back to, respectively, 2 December 2003 and 11 September 2006, whereas, pursuant to Article 49 of the Law on the Constitutional Court, the referral should be submitted within a period of four (4) months. Even assuming that the Court would extend its authority to deal with the Applicant's Referral on the theory that the Applicant's alleged violation of the Constitution may constitute a continuing situation, the Court finds that the Referral must be rejected for the following reasons:

15. The Applicant's complaint is limited to his disagreement with the conclusions the administrative bodies and the Supreme Court, reached about the facts of his individual claims and his speculation that those bodies as well as the Supreme Court, in evaluating his claims, did not appropriately consider all the relevant evidence.

16. 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 [GC], no. 30544/96, § 28, European Court on Human Rights [ECHR] 1999-I).

17. 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).

18. In the present case the Applicant was afforded ample opportunities to present his case and to contest the interpretation of the law which he considered incorrect, before the Ministry of Labour and Social Welfare and the Supreme Court. Having examined both administrative proceedings as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis,* Shub v. Lithuania, ECHR Decision as to the Admissibility of Application no.17064/06 of 30 June 2009).

19. Furthermore the Applicant had not submitted any *prima facie* evidence indicating a violation of his rights under the Constitution (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005).

20. It follows that the Referral is ill-founded and must be rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Article 55 of the Rules of Procedure, unanimously, in its session of 17 June 2010:

DECIDES

I. TO REJECT the Referral as inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Mr.Sc.Kadri Kryeziu, signed	Prof. Dr. Enver Hasani, signed

Shefqet Haxhiu vs. Labour Organization "Industria e Akumulatorëve"

Case KI 25/09, decision of 21 June 2010
Keywords: individual referral, right to equal assessment of employment, assessment of constitutionality and legality, prescription of referral.

The applicant filed a referral, thereby requesting the assessment of legality of Regulation on internal organization and systematisation of duties and work in the organization "Industria e Akumulatorëve". He alleges that the Regulation above is not in compliance with legal provisions, because it does not contain any description of duties and responsibilities, and thus there was a violation of his rights to equitable assessment of employment in terms of salary grading.

The Constitutional Court decided to reject the applicant's referral as inadmissible, thereby reasoning that the referral is related to a period before the date of entry into force of the Constitution, and therefore, it maintained that the referral is prescribed, therefore the applicant has not fulfilled formal criteria for review of referral.

Pristina, 21 June 2010
Ref. No.: RK 26/10

RESOLUTION ON INADMISSIBILITY

Case KI 25/09
Shefqet Haxhiu
vs.
Workers Organisation "Industria e akumulatorëve"

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

Applicant

1. The Applicant is Shefqet Haxhiu, living in Mitrovica

Responding Party

2. The Responding Party is the Workers Organisation "Industria e akumulatorëve" in Mitrovica.

Subject Matter

3. The Applicant requests the Constitutional Court to assess the legality of the Regulation on Internal Organisation and Systematisation of Works and Working Tasks of the Workers Organisation "Industria e akumulatorëve" in Mitrovica.

4. According to the Applicant, the Regulation is not compliant with positive legal provisions, in that it does not contain the description of all jobs and working tasks, which represents the basis for assessing performance and work results, while its tabular part does not respect the coefficients and measurement scales, compliant with the educational qualifications.

5. He alleges that his "right to equal evaluation of employment in relation to payment determination" has been violated.

Legal basis

6. Article. 113 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).

Summary of proceedings before the Court

7. On 20 May 2009, the Applicant filed a Referral with the Constitutional Court.

8. On 29 April 2010, after having considered the Report of the Reporting Judge, Snezhana Botusharova, the Review Panel, composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Gjyljeta Mushkolaj, recommended to the full Court to reject the case as inadmissible.

Summary of facts

9. It appears from the Applicant's submissions that he was offered employment by the Lead and Zink Mining, Metallurgic and Chemical Corporation Trepca in Mitrovica in 1968. On 16 February 1988, the Regulation on Internal Organisation and Systematisation of Works and Working Tasks of the Working Organisation "Industria e akumulatorëve" (hereinafter : the Regulation) was approved through a referendum held amongst the workers.

10. By letter of 30 December 1988, the Applicant requested the Employees Council of the Working Organisation to appoint him to a position commensurate with his tasks and qualifications, for the reason that he fulfilled all requirements as regards qualification, working experience and other determined criteria, necessary for the position. At the same time, he complained that the Council had not appointed him to that position in its decision of 1 January 1988, but had appointed others who did not possess the appropriate qualifications. The Applicant, therefore, requested the Employee Council to appoint him to the position concerned and to re-issue a new decision to that effect.

11. On 1 April 1993, the Constitutional Court in Belgrade reviewed the Applicant's request for the evaluation of legality of the Regulation of 16 February 1988, but declared itself incompetent to do so.

Applicant's allegations

12. The Applicant alleges that the Regulation in question is not compliant with positive legal provisions, in that it does not contain the description of all jobs and working tasks, which represents the basis for assessing performance and work results, while its tabular part does not respect the coefficients and measurement scales, compliant with educational qualifications.

13. The Applicant complains that his "right to equal evaluation in employment in relation to payment determination" has been violated.

Assessment of admissibility of the Referral

14. In order to be able to adjudicate the Applicant's Referral, the Constitutional Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and the Law.

15. In this connection, the Constitutional Court notes that the Applicant's complaint is related to a period prior to the date of the entry into force of the Constitution (see Blečić v. Croatia, Application no. 59532/00, ECHR Judgment of 29 July 2004) and, therefore, concludes that the Referral is out of time.

16. It follows that the Applicant has not fulfilled the formal requirements for the admissibility of the Referral, as laid down in Article 22.1 of the Law.

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 shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova , signed	Prof. Dr. Enver Hasani , signed

Misin Beqiri vs. Decision of 29 June 2007 of Ministry of Health of the Republic of Kosovo

Case KI 17/09, decision of 22 June 2010
Keywords: individual referral, right to medical treatment, right to life.

The applicant filed a referral claiming that due to failure to implement the decision of 29 June 2007 on allocation of a fund of 30.000 Euros for treatment of his daughter abroad issued by the Central Board of Ministry of Health, his right to medical treatment was violated. The allegations of the applicant were not followed by an identification of specific Constitutional provisions claimed to have been violated.

The Constitutional Court decided to reject the referral as inadmissible, thereby reasoning that applicant's complaints are related to a period before the date of entry into force of the Constitution, and therefore the referral is prescribed. Even if assumed that the applicant filed his referral in due time, the Court maintains that the applicant has in no way supported his allegations that legal remedies provided by Law on Administrative Procedure and Law on Executive Procedure would not be available, and even if they would be available, they would not be effective. Pursuant to this, the Court found that the applicant may not be considered to have met the requirements as per Article 113.7 of the Constitution, which provides that "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".

Pristina, 22 June 2010
Ref. No.:RK 28/10

RESOLUTION ON INADMISSIBILITY

Case No. KI 17/09
Misin Beqiri
vs.
The Ministry of Health 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

Applicant

1. The Applicant, Misin Beqiri, is residing in the village Shtutica, Municipality of Drenas.

Subject matter

2. The Applicant alleges that due to lack of the implementation of Decision from 29 June 2007 issued by the Central Board for Implementation of Overseas Treatment of the Ministry of Health the right to the medical treatment of his minor child has been violated.

Legal basis

3. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article 20 of 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).

Summary of the proceedings before the Court

4. The Applicant submitted his Referral to the Constitutional Court on 2 June 2009. On the same date the Applicant was informed by the Provisional Secretariat of the Court that his case would be considered once the Constitutional Court becomes fully functional.

5. On 18 December 2009 the Constitutional Court communicated the Applicant's case to the Ministry of Health. The Court has not received any reply within the prescribed time-limit.

6. On 13 May 2010 after having considered the Report of the Reporting Judge, Snezhana Botusharova, the Review Panel, composed of Judges Altay Suroy, Judge (Presiding), Enver Hasani and Iliriana Islami, on the same date, recommended to the full Court to reject the case as inadmissible

Facts

7. It appears from the documents submitted by the Applicant that his late minor daughter who was born on 4 January 2001, had suffered from a grave health condition (Dg. Leucosis acuta lymphoblastica).

8. The Applicant's daughter was hospitalised at the University Clinical Centre Pristina in the period from 12 June 2007 to 26 June 2007.

9. On 27 June 2007 the University Clinical Centre in Skopje, issued a certificate according to which the whole treatment of the Applicant's daughter in their hospital would cost 30,000 Euro.

10. On 29 June 2007 the University Clinical Centre in Pristina issued an opinion that on the basis to the medical diagnoses the Applicant's daughter should be sent to a more advanced medical centre abroad for further medical treatment.

11. On the same date, i.e. on 29 June 2007, the Central Board for Implementation of Overseas Treatment issued a decision according to which the amount of 30,000 Euro should be allocated for the medical treatment of the Applicant's daughter in Skopje. The Ministry of Health and the Ministry of Economy and Finances approved this decision on the same date.

12. However this decision was not ever enforced.

13. Due to the absence of the Governmental financial support, the Applicant was bound to self-finance the medical treatment of his daughter in Italy to which the Italian KFOR had assisted. Eventually the Applicant's daughter was sent to Rome for medical treatment.

14. Unfortunately, on 18 October 2007 the Applicant's daughter passed away.

15. On 30 November 2007 the Applicant submitted his complaint to the Ombudsperson Institution in Kosovo. Subsequently, the Ombudsperson communicated the Applicant's case with the Minister of Health on 5 September 2008.

16. In his letter to the Ministry of Health the Ombudsperson concluded that "there has been a lack of transparency in relation to treatment abroad, and in terms of urgency in receiving a reply in relation to the possibility of realizing the request." The Ombudsperson further emphasised that he believes that failure of the Ministry of Health to provide reply and

assistance in response to the Applicant's request is violation of the right to life as provided by Article 2 of the European Convention on Human Rights.

17. On 23 September 2008 the Ministry of Health replied to the Ombudsperson and stated, *inter alia*, that "lack of budget for the [Applicant's daughter] case and low prospects for success were the factors determining non-realization of the programme."

Applicant's allegations

18. The Applicant complains, without specifying any particular provision of the Constitution, that the right to medical treatment of his child has been violated.

Assessment of the Admissibility of the Referral

19. In order to be able to adjudicate the Applicant's Referral, the Constitutional Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and the Law.

20. The Constitutional Court notes that the Applicant complained that Decision of Central Board for Implementation of Overseas Treatment issued on 29 June 2007 was never enforced.

21. In this connection, the Constitutional Court notes that the Applicant's complaint is related to a period prior to the date of the entry into force of the Constitution (see Blečić v. Croatia, Application no. 59532/00, ECHR Judgment of 29 July 2004) and, therefore, concludes that the Referral is out of time.

22. The Constitutional Court also recalls that pursuant to Article 113.7 of the Constitution

    "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."

23. Even assuming that Applicant submitted his Application in time, the Constitutional Court notes the Applicant has not substantiated in whatever manner, why he considers that the legal remedies prescribed in the Law on the Administrative Procedure (No. 02/L-28 of 22 July 2005) and/or Law on Executive Procedure (No 2008/03-L008 of 2 June 2008) would not be available and, if available, would not be effective and, therefore, not need to be exhausted.

24. Consequently, the Applicant cannot be considered to have fulfilled the requirements for admissibility of the Referral.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Article 55 of the Rules of Procedure, unanimously, in its session of 22 June 2010:

DECIDES

I. TO REJECT the Referral as inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova, signed	Prof. Dr. Enver Hasani, signed

Imer Ibrahimi and 48 other former employees of the Kosovo Energy Corporation vs. 49 individual judgments of the Supreme Court of Kosovo

Case KI 40/09, decision of 23 June 2010
Keywords: individual/group referral, right to pension, right to property, right to fair and impartial trial.

The applicants filed a referral against 49 judgments of the Supreme Court, which annulled decisions of the Municipal Court and District Court in Pristina, on allowing monetary compensation by the Kosovo Energy Corporation (KEK) on behalf of their pension rights. The applicants alleged that the right to fair and impartial trial and the right to property were violated.

The Constitutional Court decided to reject referrals of twelve applicants as inadmissible, reasoning that such referrals are premature, since their cases were still being reviewed in regular courts. Further, the Court found as partially admissible referrals of five applicants who have already reached the age of 65, and they are entitled to pension from the Ministry of Labour and Social Welfare. Therefore, the Court decided to review their referrals for the period before they reached such age. On the other hand, in reviewing admissibility of referrals of other applicants, the Court, referring to case law of the European Court of Human Rights, considered that the legal deadline of four months would not be taken into account, since the case in hand was a "continuing situation", which would exclude the legal deadlines for filing referrals. On these grounds, the Court found referrals of thirty-seven other applicants to be admissible.

In reviewing merits, the Court decided that property rights of applicants were violated by termination of contracts they had signed with KEK, without fulfilling conditions of termination provided by the contract, respectively before establishment and functionalization of Pension and Invalidity Insurance Fund. Furthermore, the Court also decided that there was a violation of the right to a fair and impartial trial, as guaranteed by the Constitution and the European Convention on Human Rights, considering that the Supreme Court had neglected an important argument, the non-existence of the Pension and Invalidity Insurance Fund, in reaching its decisions.

Pristina, 23 June 2010
Ref. No.: AGJ 30/10

JUDGMENT

Case No. KI 40/09
IMER IBRAHIMI AND 48 OTHER FORMER EMPLOYEES OF THE KOSOVO ENERGY CORPORATION
vs.
49 INDIVIDUAL JUDGMENTS OF THE SUPREME COURT 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

Introduction
The Applicants are as follows:

1. Imer Ibrahimi,
2. Behram Rrahmani,
3. Halit Bilalli,
4. Shefki Veseli,
5. Ramadan Zeqiri,
6. Nazif Grajqevci,
7. Fatime Hyseni,
8. Adem Berisha,
9. Fetah Latifi,
10. Ragip Megjuani,
11. Ali Latifi,
12. Shaban Kodraliu,
13. Sahit Zekolli,
14. Ilaz Ademi,
15. Ali Shala,
16. Shefqet Feta,
17. Selatin Hashani,
18. Jetullah Grajqevci,
19. Avdi Grajqevci,
20. Avdyl Krasniqi,
21. Milazim Shala,
22. Musli Podvorica,
23. Fikrete Hashani,
24. Ferat Berisha,
25. Ahmet Krasniqi,
26. Halit Mjeku,
27. Ali Baruti,
28. Ibush Hashani,
29. Avdyl Luta,
30. Hevzi Demolli,
31. Hajzer Zeqiri,
32. Hilmi Mehmeti,
33. Mustaf Sahiti,
34. Bedri Salihu,
35. Igballe Sallova,
36. Bajram Krasniqi,
37. Murat Rafuna,
38. Fadil Saraqi,
39. Rrahman Merlaku,
40. Zarife Shatrolli,
41. Sami Klinaku,
42. Ismet Grajqevci,
43. Sanije Hashani,
44. Nazmi Raqi,
45. Vehbi Aliu,
46. Selman Berisha,
47. Shefqet Muli,
48. Bajram Syla,
49. Avdullah Selimi

1. In this Judgement for ease reference the Applicants have been numbered and may be referred to collectively as "Imer Ibrahimi and 48 other former employees of Kosovo Energy Corporation (KEK)". In the proceedings before the Constitutional Court they were represented by Organizational Council of 49 KEK employees, Luan Hardinaj, St, 9-A/1, Prisitina.

The Applicants challenge the following Judgments of the Supreme Court of Kosovo adopted in the cases of

1. Imer Ibrahimi, Rev. no. 57/2009 dated 11.02.09;
2. Behram Rrahmani, Rev. no. 36/2009 dated 11.02.09;
3. Halit Bilalli, Rev. no. 136/2008 dated 11.02.09;
4. Shefki Veseli, Rev. no. 104/2008 dated 27.01.09;
5. Ramadan Zeqiri, Rev. no. 597/08; dated10.03.09;
6. Nazif Grajqevci, Rev. no. 474/08 dated 10.02.09,
7. Fatime Hyseni, Rev.no. 534/08 dated 22.04.09;
8. Adem Berisha, Rev. no. 48/2009 dated 11.02.09;
9. Fetah Latifi, Rev.no.554/2008 dated 23.02.09;
10. Ragip Megjuani, Rev. no. 478/2008 dated 11.02.09;
11. Ali Latifi, Rev. no.521/2008 dated 23.02.09;
12. Shaban Kodraliu, Rev.no. 544/2008 dated 11.02.09;
13. Sahit Zekolli, Rev.no. 90/2008 dated 25.02.09;
14. Ilaz Ademi, Rev.no. 229/2008 dated 10.02.09;
15. Ali Shala, Rev. no. 54/2009 dated 11.02.09;
16. Shefqet Feta, Rev. no. 487/2008 dated11.02.09;
17. Selatin Hashani, Rev. no. 59/09 dated 30.06.08;
18. Jetullah Grajqevci, Rev.no150/2009 dated 02.06.09;
19. Avdi Grajqevci, Rev.no. 227/2008 dated 11.02.09;
20. Avdyl Krasniqi, Rev.no. 476/2008 dated 23.02.09;
21. Milazim Shala, Rev.no. 574/2008 dated 11.02.09;
22. Musli Podvorica, Rev.no. 464/2008 dated 23.02.09;
23. Fikrete Hashani, Rev.no. 225/2009 dated 18.06.09;
24. Ferat Berisha, Rev.no. 138/2009 dated 02.06.09;
25. Ahmet Krasniqi, Rev.no. 426/2008 dated 10.02.09;
26. Halit Mjeku, Rev.no. 567/08 dated 10.03.09;
27. Ali Baruti, Rev.no. 45/2009 dated 11.02.09;
28. Ibush Hashani, Rev.no. 97/2009 dated 17.03.09;
29. Avdyl Luta, Rev. no. 565/2008 dated 11.02.09;
30. Hevzi Demolli, Rev.no. 64/2009 dated 02.02.09;
31. Hajzer Zeqiri Rev. no. 518/2008 dated 23.02.09;
32. Hilmi Mehmeti, Rev.no.571/2008 dated11.02.09;
33. Mustaf Sahiti, Rev.no.259/2008 dated 23.02.09;
34. Bedri Salihu, Rev.no. 435/2008 dated 10.02.09;
35. Igballe Sallova, Rev.no. 545/2008 dated 23.02.09;

36. Bajram Krasniqi, Rev.no. 569/2008 dated. 23.02.09;
37. Murat Rafuna, Rev.no. 491/2008 dated 23.02.09;
38. Fadil Saraqi, Rev.no.506/2008 dated 23.02.09;
39. Rrahman Merlaku, Rev.no.441/2008 dated.10.02.09;
40. Zarife Shatrolli, Rev.no.454/2008 dated 23.02.09;
41. Sami Klinaku, Rev.no. 63/2009 dated 11.02.09;
42. Ismet Grajqevci, Rev.no. 479/2008 dated 23.02.09;
43. Sanije Hashani, Rev.no. 460/2008 dated 11.02.09;
44. Nazmi Raqi, Rev.no. 270/2009 dated18.06.09;
45. Vehbi Aliu, Rev.no. 269/2009 dated 01.07.09;
46. Selman Berisha, Rev.no. 41/09 dated 30.06.09;
47. Shefqet Muli, Rev.no. 222/2008 dated 10.02.09;
48. Bajram Syla, Rev.no. 142/2009 dated 17.03.09 and
49. Avdullah Selimi, Rev.no. 438/2008 dated 10.02.09

Subject matter

2. The subject matter of this Referral is the assessment of the constitutionality of the individual judgments adopted by the Supreme Court of the Republic of Kosovo in 49 individual cases of the Applicants against KEK as listed and specified above.

Legal basis

3. The Referral is based on Article 113 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 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Summary of the facts as alleged by the parties

4. At the outset it should be noted that the Applicants' Referral raise identical issues that derive from the same underlying problem that is summarised in paragraphs 4 to 28 which follow.

5. In the course of 2001 and 2002, each Applicant signed an Agreement for Temporary Compensation of Salary for Termination of Employment Contract with their employer KEK. These Agreements were, in substance, the same.

6. Article 1 of the Agreements established that, pursuant to Article 18 of the Law on Pension and Invalidity Insurance in Kosovo (Official Gazette of

the Social Autonomous Province of Kosovo No 26/83, 26/86 and 11/88) and at the conclusion of KEK Invalidity Commission, the beneficiary (i.e. each of the Applicant) is entitled a temporary compensation due to early termination of the employment contract until the establishment and functioning of the Kosovo Fund on Pension-Invalidity Insurance.

7. Article 2 of the Agreements specified that the amount to be paid monthly to each Applicant was to be 206 German Marks.

8. Article 3 specified that "payment shall end on the day that the Kosovo Pension-Invalidity Insurance Fund enters into operation. On that day onwards, the beneficiary may realize his/her rights in the Kosovo Pension and Invalidity Insurance Fund (the Kosovo Pension Invalidity Fund), and KEK shall be relieved from liabilities to the User as per this Agreement."

9. On 1 November 2002, the Executive Board of KEK adopted a Decision on the Establishment of the Pension Fund, in line with the requirements of UNMIK Regulation No 2001/30 on Pensions in Kosovo. Article 3 of this Decision reads as follows: "The Pension Fund shall continue to exist in an undefined duration, pursuant to terms and liabilities as defined with Pension Laws, as adopted by Pension Fund Board and KEK, in line with this Decision, or until the legal conditions on the existence and functioning of the Fund are in line with Pension Regulations or Pension Rules adopted by BPK."

10. On 25 July 2006, the KEK Executive Board annulled the above mentioned Decision on the Establishment of the Supplementary Pension Fund and terminated the funding and functioning of the Supplementary Pension Fund, with effect from 31 July 2006. According to the Decision of 25 July 2006, all beneficiaries were guaranteed full payment in line with the Fund Statute. Furthermore the total obligations towards beneficiaries were 2, 395,487 Euro, banking deposits were 3,677,383 Euro and asset surplus from liability were 1,281,896 Euro. The Decision stated that KEK employees that are acknowledged as labour disabled persons by the Ministry of Labour and Social Welfare shall enjoy rights provided by the Ministry. On 14 November 2006, KEK informed the Central Banking Authority that "decision on revocation of the KEK Pension Fund is based on decision of the KEK Executive Board and the Decision of the Pension Managing Board... <u>due to the financial risk that the scheme poses to KEK in the future</u>."

11. According to the Applicants, KEK terminated the payment stipulated by the Agreements in the summer of 2006 without any notification. The

Applicants claim that such an action is in contradiction to the Agreements signed.

12. The Applicants also claim that it is well known that the Kosovo Pension Invalidity Fund has not been established yet.

13. On the other hand, KEK contested the Applicants' allegations arguing that it is widely known that the Invalidity Pension Fund has been functioning since 1 January 2004.

14. According to KEK, the Applicants are automatically covered by the national invalidity scheme pursuant to UNMIK Regulation No 2003/40 on Promulgation of the Law on Invalidity Pensions in Kosovo (Law No 2003/23).

15. KEK further argues that on 31 August 2006 it issued a Notification according to which all beneficiaries of the KEK Supplementary Fund had been notified that the Fund was terminated. The same notification confirmed that all beneficiaries were guaranteed complete payment in compliance with the SPF Statute, namely 60 months of payments or until the beneficiaries reached 65 years of age, pursuant to the Decision of the Managing Board of the Pension Fund of 29 August 2006.

16. KEK further argues that the Applicants did not contest the Instructions to invalidity pension and signature for early termination of employment pursuant to the conclusion of the Invalidity Commission.

17. The Applicants sued KEK before the Municipality Court in Pristina, requesting the Court to order KEK to pay unpaid payments and to continue to pay 105 Euro (equivalent to 206 German Marks) until conditions are met for the termination of the payment.

18. The Municipality Court in Pristina approved the Applicants' claims and ordered monetary compensation. The Municipal Court of Pristina found (e.g. the Judgment C No 1891/2006 of 15.1. 2008 in the case of the first Applicant Imer Ibrahimi) that the conditions provided by Article 3 of the Agreements have not been met. Article 3 of the Agreements provides for salary compensation until exercise of the Applicants' right, "which means an entitlement to a retirement scheme, which is not possible for the plaintiff, because he has not reached the age of 65."

19. The Municipality Court further stated in the above quoted judgment that payment of compensation cannot be connected to provisions of the Supplementary Pension Statute, since the Agreements were signed earlier and the Statue has not provided that the Agreements that entered

into earlier cases shall cease to be valid. This Court also clarified that according to Article 262 of the Law on Obligations and Contracts the creditor (i.e. an Applicant) was entitled to seek performance of the obligation, while the debtor (i.e. KEK) is bound to perform such obligation.

20. KEK appealed against the judgments of the Municipality Court to the District Court, arguing, *inter alia,* that the Municipal Court judgment was not fair because the Agreements were signed with the Applicants because of the invalidity of the Applicants and that they can not claim continuation of their working relations because of their invalidity.

21. KEK reiterated that the Court was obliged to decide upon the UNMIK Regulation 2003/40 on the promulgation of the Law on Invalidity Pensions according to which the Applicants were entitled to an invalidity pension.

22. The District Court in Pristina rejected the appeals of KEK and found their submissions ungrounded (e.g. the Judgment of 22 October 2008, Ac.nr. 719/2008, in the case of the first Applicant Imer Ibrahimi). According to the Court, the termination of the Agreements and stopping of the severance pay was in contradiction with Article 3 of the Agreement, especially when considering that if the employee had been notified of such action he would not have signed the agreement and would have continued to work for the respondent (KEK).

23. KEK submitted a revision to the Supreme Court because of an alleged essential violation of the Law on Contested Procedure and erroneous application of material law (e.g. Revision by KEK of 17 November in the case of the first Applicant Imer Ibrahimi). It repeated that the Applicants were entitled to the pension provided by the 2003/40 Law and that because of humanitarian reasons it continued to pay monthly compensation after the Law entered into force. It argued that the age of the applicant was not relevant but his invalidity was.

24. The Supreme Court accepted the revisions of KEK, and quashed the judgments of the District Court and the Municipality Court in Pristina and rejected as unfounded the Applicants' lawsuits.

25. The Supreme Court argued that the manner of termination of employment was considered lawful pursuant to Article 11.1 of UNMIK Regulation 2001/27 on the Basic Labour Law in Kosovo.

26. The Supreme Court also stated the following in the case of Imer Ibrahimi (see the judgment of the Supreme Court Rev.Nr.57/2009 of 11 February

2009): “taking into account the undisputed fact that the respondent party fulfilled the obligation towards the plaintiff, which is paying salary compensation according to the specified period which is until the establishment and functioning of the Invalidity and Pension Insurance Fund in Kosovo effective from 1 January 2004, the Court found that the respondent party fulfilled the obligation as per the agreement. Thus the allegations of the plaintiff that the respondent party has the obligation to pay him the temporary salary compensation after the establishment of the Invalidity and Pension Insurance Fund in Kosovo are considered by this Court as unfounded because the contractual parties until the appearance of solving condition- establishment of the mentioned fund have fulfilled their contractual obligations... ”

27. On 15 May 2009, Kosovo Ministry of Labour and Social Welfare issued the following note to the Applicants: “The finding of the Supreme Court of Kosovo, in its reasoning of Judgment Rev. I No 454/2008, that in the Republic of Kosovo there is a Pension and Invalidity and Pension Insurance Fund which is functional since 1 January 2004 is not accurate and is ungrounded. In giving this statement, we consider the fact that UNMIK regulation 2003/40 promulgates the Law No 2003/213 on the pensions of disabled persons in Kosovo, which regulates over permanently disabled persons, who may enjoy this scheme in accordance with conditions and criteria as provided by this law. Hence let me underline that the provisions of this Law do not provide for the establishment of a Pension and Invalidity Insurance in the country. Establishment of the Pension and Invalidity Insurance Fund in the Republic of Kosovo is provided by provisions of the Law on pension and Invalidity Insurance Funds, which is in the process of drafting and approval at the Government of Kosovo.” The same note clarifies that at the time of writing that note, the pension *inter alia* existed “Invalidity pension in amount of 45 Euro regulated by the Law on Pensions of Invalidity Persons (beneficiaries of these are all persons with full and permanent Invalidity)” as well as “contribution defined pensions of 82 Euro that are regulated by Decision of the Government (the beneficiaries of these are all the pensioners that have reached the pensions age of 65 and who at least have 15 years of working experience)”.

28. The Constitutional Court became aware that some of the Applicants, including the first Applicant Imer Ibrahimi, submitted a Proposal to Re-open the Procedure to the Municipal Court in Pristina based on the above mentioned note of the Ministry of 15 May 2009. KEK objected. However, in Mr Ibhahimi’s case, as in 11 others, i.e. the first 12 Applicants listed above, the District Court in Pristina allowed the re-opening of the contested procedure and quashed the judgments of the Supreme Court of Kosovo. The District court based these decisions on

Article 239 para.1 of the Law on Contested Procedure. The cases of these Applicants are currently pending before the Municipal Court of Pristina.

29. Some of the Applicants, in particular the Applicants numbered 13, 14, 15, 16 and 17, are older than 65 years of age.

Complaints

30. The Applicants complain that their rights have been violated because KEK unilaterally annulled their Agreements although the condition prescribed in Article 3, the establishment of the Kosovo Pension-Invalidity Insurance Fund) had not been fulfilled. The Applicants further argued that they have not been able to remedy such violation before the ordinary courts. While the Applicants do not explicitly complain of a violation of the European Convention on Human Rights (ECHR), it appears from the Applicants' submissions that the subject of the complaints are their property rights (as guaranteed by Article 1 Protocol 1 to the ECHR) as well as their right to fair trail (as guaranteed by Article 6 of the ECHR).

Summary of the proceedings before the court

31. On 11 September 2009, the Applicants filed the Referral to the Constitutional Court. The President appointed Judge Kadri Kryeziu as Judge Rapporteur and appointed a Review Panel of the Court composed of Judges Altay Suroy, presiding, Enver Hasani and Iliriana Islami. On 23 November 2009, the Constitutional Court notified the Supreme Court, in accordance with Article 26 of the Law, that the Applicants challenged 49 individual judgments that the Supreme Court adopted.

32. On 4 December 2009 the Court asked additional information about the Referral from the Ministry of Labour and Social Welfare and KEK. On 20 January 2010 the Constitutional Court asked the Municipality Court in Pristina, in accordance with Article 26 of the Law, to be provided with a copy of the entire case file in the case of the first Applicant.

33. On 19 February 2010 the Review Panel convened to consider the Judge Rapporteur's Report. On 30 April 2010, a public hearing was held at which the Organizational Council of 49 KEK employees appeared on the Applicants' behalf. The representatives of KEK and Ministry of Labour and Social Welfare were present as well as interested Parties. On 14 and on 19 May 2010, as well as on 16 June 2010, the Court met in private sessions to deliberate.

Admissibility

34. In order to be able to adjudicate the Applicants' Referral the Constitutional Court needs first to examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution.

35. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

    "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";

and to Article 47.2 of the Law, stipulating that:

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

36. As was indicated earlier, the Constitutional Court obtained copies of 12 decisions of the District Court in Pristina relating to the first 12 Applicants whose request for reopening the contested procedure was granted by the District Court in Pristina. Consequently the District Court quashed the following judgments of the Supreme Court of Kosovo in the cases of the following Applicants:

    1. Imer Ibrahimi, Rev. 57/2009 of 11.02.09
    quashed by Dec. Ac.nr.732/09 of 12.11.09;
    2. Behram Rrahmani Rev.36/2009 of 11.02.09
    quashed by Dec. Ac.nr.760/09 of 12.11.09
    3. Halit Bilalli, Rev136/2008 of 11.02.09
    quashed by Dec Ac.nr.735/09of 01.12.09;
    4. Shefki Veseli, Rev.104/2008 of 27.01.09
    quashed by Dec. Ac.nr.700/09 of 01.12.09;
    5. Ramadan Zeqiri, Rev.597/08 of 10.03.09
    quashed by Dec. Ac.nr.841/09 of 02.12.09;
    6. Nazif Grajqevci, Rev. 474/08 of 10.02.09
    quashed by Dec. Ac.nr.728/09 of 01.12.09;
    7. Fatime Hyseni, Rev. 534/08 of 22.04.09
    quashed by Dec. Ac.nr. 839/09 of 01.12.09;
    8. Adem Berisha, Rev. 48/2009 of 11.02.09
    quashed by Dec. Ac.nr.734/09 of 26.08.09;
    9.Fetah Latifi, Rev. 554/2008 of 23.02.09
    quashed by Dec. Ac.nr.761/09 of 01.12.09;
    10. Ragip Megjuani Rev 478/2008 of 11.02.09
    quashed by Dec. Ac.nr.757/09 of 26.08.09;

11. Ali Latifi, Rev. 521/2008 of 23.02.09
quashed by Dec. Ac.nr.730/09 of 26.08.09;
12. Shaban Kodraliu Rev 544/2008 of 11.02.09
quashed by Dec. Ac.nr.705/09 of 1.12.09

37. According to information that the Constitutional Court has received the cases of the above 12 listed Applicants are pending before a court. Thus, the Constitutional Court considers that their complaints are premature.

38. The Court further has to consider whether Applicants submitted their Referral within the four months time limit prescribed by Article 49 of the Law. In this connection, the Constitutional Court refers to Article 49 of the Law, which stipulates 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced…”.*

39. The Court recalls that a similar admissibility criterion is prescribed by Article 35 para 1 of the European Convention on Human Rights. According to the well-established jurisprudence of the European Court on Human Rights, “The purpose of the [six-month] rule is to promote security of the law, to ensure that cases raising Convention issues are dealt with within a reasonable time and to protect the authorities and other persons concerned from being under uncertainty for a prolonged period of time (see among many others, case of P.M. v. the United Kingdon (dec), no 6638/03, decision of 24 August 2004). The European Court of Human Rights further establishes that “The rule also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised (case of O’Loughlin and Others v. the United Kingdom (dec), no 23274/04, decision of 25 August 2005), and facilitates the establishment of facts in a case, the passage of time rendering problematic any fair examination of the issues raised (case of Nee v. Ireland (dec.), no 52787/99, decision of 30 January 2003)”.

40. However, the time limit as prescribed by the European Convention of Human Rights does not start to run if the Convention complaint stems from a continuing situation. Examples of continuing situations include complaints concerning length of domestic court proceedings, detention, and an inability to enjoy possessions. According to the case law, where the alleged violation is a continuing situation, the time limit starts to run

only from the end of continuing situation. (see case of Jėčius v. Lithuania, Application No. 34578/9 7, ECHR judgment of 31 July 2000, para 44).

41. In the present case the Applicants still suffer from the unilateral annulment of their Agreements signed by KEK. They argue that is well established that the Pension and Invalidity Insurance Fund has not been established to date. Therefore, there is continuing situation. As the circumstance of which the Applicants complain continued, the four months period as prescribed in Article 49 of the Law is inapplicable to these cases.

42. The Constitutional Court is cognizant that some of the Applicants were older than 65 years at the time of submitting their Referral to this Court.

43. These Applicants are:

    13. Sahit Zekolli, born in 1943;
    14. Ilaz Ademi, born in1945;
    15. Ali Shala, born in1945;
    16. Shefqet Feta, born in 1945;
    17. Selatin Hashani, born in 1944.

44. The Constitutional Court recalls that the Applicants attached to their Referral the Note issued by the Ministry of Labour and Social Welfare on 15 May 2009 (see para. 27 above) according to which persons who have reached the pensions age of 65 and who have at least 15 years of working experience are entitled to pension in a monthly amount of 82 Euro. The substance of this Note has been confirmed by the representative of the Ministry at the public hearing of the Court held on 30 April 2010.

45. It appears consequently that the above listed Applicants are entitled for pension from the moment when they reached the age of 65.

46. However, their complaints, to the extent of unpaid compensation for the period prior to that moment, on account of a continuing situation, remain at issue.

47. Therefore, the Referral of the Applicants 13. Sahit Zekolli, 14.Ilaz Ademi, 15.Ali Shala, 16.Shefqet Feta and 17.Selatin Hashani is partly admissible.

48. With regard to the remaining Applicants listed under number 18-49, the Constitutional Court does not find any reason for inadmissibility of the Referral.

Merits

i. As regards the Protection of Property

49. The Applicants complain that their rights have been violated because KEK unilaterally annulled their Agreements although the condition prescribed in Article 3 (i.e. establishment of the Kosovo Pension-Invalidity Insurance Fund) had not been fulfilled. In substance, the Applicants complain that there has been a violation of their property rights.

50. At the outset, the following legal provisions should be recalled:

Article 53 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."*

Article 46 [Protection of Property] of the Constitution reads as follows

> *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.*

Article 1 of Protocol No. 1 of the European Convention on Human Rights provides

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the*

use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

51. The Constitutional Court reiterates the jurisprudence of the European Court of Human Rights according to which the concept of "possessions" referred to in the first part of Article 1of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights" and thus as "possessions" for the purposes of Article 1of Protocol No. 1.

52. In fact, this provision does not guarantee the right to acquire property (see *mutatis mutandis* Kopecký v. Slovakia, Application No. 44912/98, ECHR Judgment of 28 September 2004). According to the case law of European Court of Human Rights, an Applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision.

53. Furthermore, "possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition" (see Kopecký, cited above para. 35; Prince Hans-Adam II of Liechtenstein v. Germany, no. 42527/98, paras 82-83, ECHR 2001-VIII; and Gratzinger and Gratzingerova v. the Czech Republic (dec.) [GC], no. 39794/98, para. 69, ECHR 2002-VII).

54. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, confer on the Applicant a title to a substantive interest protected by Article 1of Protocol No. 1 to the ECHR (see Iatridis v. Greece, [GC], no. 31107/96; Beyeler v. Italy [GC], no. 33202/96, § 100, ECHR 2000-I; Broniowski v. Poland [GC], no. 31443/96, para. 129, ECHR 2004-V; and Anheuser-Busch Inc. v. Portugal [GC], no. 73049/01, para.63. ECHR 2007-...).

55. The Constitutional Court notes that, at the time of concluding the Agreements between the Applicants and KEK, these type of agreements have been regulated by the Law on Contract and Torts (Law on Obligations) published in Official Gazette SFRJ 29/1978 and amended in 39/1985, 45/1989, 57/1989.

Article 74(3) of the Law on Contract and Torts reads as follows:

> *"After being concluded under rescinding condition (raskidnim uslovom) the contract shall cease to be valid after such condition is valid."*

56. The crux of the mater is therefore whether the rescinding condition under which the Agreements were signed has been met. Answering that question will allow the Constitutional Court to assess whether the circumstances of this Referral, considered as a whole, confer on the Applicants title to a substantive interest protected by Article 1of Protocol No. 1 to the ECHR.

57. The Constitutional Court notes that it is clear from the documents and it is undisputable between the parties that the "rescinding condition" under which the Agreements have been signed is the establishment and functioning of the Kosovo Fund on Pension-Invalidity Insurance.

58. In this respect, the Constitutional Court also notes that, according to the Ministry of Labour and Social Welfare, the establishment of the Pension and Invalidity Insurance Fund, at the date of the hearing, was to be provided by the Law on Pension and Invalidity Insurance Funds. This was in the process of drafting and approval with the Government of Kosovo. The representative of the Ministry confirmed this information at the public hearing the Constitutional Court held on 30 April 2010.

59. The Court further notes that Article 1 of the Agreements refer to Article 18 of the Law on Pension and Invalidity Insurance in Kosovo (Official Gazette of the Social Autonomous Province of Kosovo No 26/83, 26/86 and 11/88). Article 18 of the 1983 Law on Pension and Invalidity Insurance reads as follows:

    "The insured person is entitled to an early retirement after reaching at least 55 and 35 years of work experience (man) or respectively at least the age of 50 and 35 years of work experience (woman).

    Early retirement pension shall be set according to length of work experience and decreased by 0.5% for every year of early retirement, before reaching the age of 60 (men), respectively 55 (women).

    When the beneficiary of the early retirement pension reaches the age of 60 (man), respectively 55 (woman), the pension shall not be decreased as per paragraph 2 of this Article."

60. The Constitutional Court considers that the Applicants, when signing the Agreements with KEK, had a legitimate expectation that they would be

entitled to the monthly indemnity in the amount of 105 Euro until the Pension and Invalidity Insurance Fund was established.

61. Such legitimate expectation is guaranteed by Article 1 of Protocol No. 1 to the Convention, its nature is concrete and not a mere hope, and is based on a legal provision or a legal act, i.e. Agreement with KEK (see *mutatis mutandis* Gratzinger and Gratzingerova v. the Czech Republic (dec.), no. 39794/98, para 73, ECHR 2002-VII).

62. Therefore, the Constitutional Court considers that the Applicants have a "legitimate expectation" that their claim would be dealt in accordance with the applicable laws, in particular the above quoted provisions of the Law on Contract and Torts and the Law on Pension and Invalidity Insurance in Kosovo, and consequently upheld (see mutatis mutandis Pressos Compania Naviera S.A. and Others v. Belgium, judgment of 20 November 1995, Series A no. 332, para. 31; S.A. Dangeville v. France, no. 36677/97, para. 46 48, ECHR 2002-III).

63. However, the unilateral cancellation of the Agreements, prior to the rescinding condition having been met, breached the Applicants' pecuniary interests which were recognized under the law and which were subject to the protection of Article 1 of Protocol No. 1. (See the EuropePlehanow v. Poland, Application no. 22279/04, and judgment of 7 July 2009).

64. Consequently, the Constitutional Court concludes that there is a violation of Article 46 of the Constitution in conjunction Article 1 of Protocol 1 to the European Convention on Human Rights.

ii. as regards the right to fair trail

65. The Applicants further complain that they have not been able to the remedy violation of their property rights before the ordinary courts.

Article 31 [Right to Fair and Impartial Trial] of the Constitution, reads as follows:

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

Article 6 of the European convention on Human Rights

> *"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."*

66. 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, including the Supreme Court. In general, "Courts shall adjudicate based on the Constitution and the law" (Article 102 of the Constitution). More precisely, the role of the ordinary courts is 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).

67. On the other side, "The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution" (Article 112. 1 of the Constitution. Thus, 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).

68. According to the jurisprudence of the European Court of Human Rights, Article 6 para. 1 of the ECHR obliges courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is, moreover, necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. Thus the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case (see Ruiz Torija v. Spain, judgment of 9 December 1994, Series A no. 303-A, § 29).

69. The Constitutional Court recalls that the Convention does not guarantee, as such, a right of access to a court with competence to invalidate or override a law, or to give an official interpretation of a law (see, mutatis mutandis, Gorizdra v. Moldova (dec.), no. 53180/99, 2 July 2002; and James and Others v. the United Kingdom, judgment of 21 February 1986, Series A no. 98, para. 81). Neither does it guarantee any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling (see Cowme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, para. 114, ECHR 2000-VII). Therefore, the question whether

a court has failed to provide reasons for its judgment in this respect can only be determined in the light of the circumstances of the case, as mentioned above.

70. In the instant case, the Applicants requested the ordinary courts to determine their property dispute with the KEK. The Applicants referred, in particular, to the provision of Article 3 of the Agreements, stating that the Law on Pension that establishes Pension and Invalidity Insurance Fund has not been adopted yet. This fact has been confirmed by the representative of the responsible Ministry of Labour and Social Welfare (see above para 58.)

71. However, the Supreme Court made no attempt to analyze the Applicants' claim from this standpoint, despite the explicit reference before every other judicial instance. Instead the Supreme Court view was that it was an undisputed fact that the respondent party (KEK) fulfilled the obligation towards the plaintiff, which was paying salary compensation according to specified period which was until the establishment and functioning of the Invalidity and Pension Insurance Fund in Kosovo effective from 1 January 2004 (see above para 26.)

72. It is not the task of the Constitutional Court to decide what would have been the most appropriate way for the ordinary courts to deal with the Applicants' argument, i.e. fulfilling the rescinding condition of Article 3 of the Agreements, which fulfillment is also regulated by Article 74(3) of the Law on Contract and Torts taken in conjunction with Article 18 of the 1983 Law on Pension and Invalidity Insurance.

73. However, in this Court's opinion, the Supreme Court, by neglecting the assessment of this point altogether, even though it was specific, pertinent and important, fell short of its obligations under Article 6 para 1 of the ECHR.(see *mutatis mutandis,* European Court of Human Rights, Judgment of 18 July 2006 in the case Pronina v. Ukraine, Application no. 63566/00.)

74. In view of the above, the Constitutional Court concludes that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

FOR THESE REASONS

Based on Article 113 of the Constitution, Article 20 of the Law and Section 55 and 70 of the Rules of Procedure, the Constitutional Court unanimously:

DECIDES

I.To Declare as

a) *Inadmissible the Referral with regard to the Applicants*

1. Imer Ibrahimi,
2. Behram Rrahmani,
3. Halit Bilalli,
4. Shefki Veseli,
5. Ramadan Zeqiri,
6. Nazif Grajqevci,
7. Fatime Hyseni,
8. Adem Berisha,
9. Fetah Latifi,
10. Ragip Megjuani,
11. Ali Latifi, and
12. Shaban Kodraliu.

b) *partly admissible the Referral with regard to the Applicants*

13. Sahit Zekolli,
14.Ilaz Ademi,
15.Ali Shala,
16.Shefqet Feta and
17.Selatin Hashani.

c) *admissible the Referral with regard to the Applicants listed under number 18-49.*

II.To Find that

a) *there has been a violation of Article 46 of the Constitution of the Republic of Kosovo* in conjunction with Article 1 Protocol 1 to the European Convention on Human Rights, in the cases of the Applicants:

13.Sahit Zekolli,
14. Ilaz Ademi,
15.Ali Shala,
16. Shefqet Feta,
17. Selatin Hashani,
18. Jetullah Grajqevci,
19. Avdi Grajqevci,
20. Avdyl Krasniqi,
21. Milazim Shala,
22. Musli Podvorica,
23. Fikrete Hashani,
24. Ferat Berisha,
25. Ahmet Krasniqi,
26. Halit Mjeku,
27. Ali Baruti,
28. Ibush Hashani,

29. Avdyl Luta,
30. Hevzi Demolli,
31. Hajzer Zeqiri,
32. Hilmi Mehmeti,
33. Mustaf Sahiti,
34. Bedri Salihu,
35. Igballe Sallova,
36. Bajram Krasniqi,
37. Murat Rafuna,
38. Fadil Saraqi,
39. Rrahman Merlaku,
40. Zarife Shatrolli,
41. Sami Klinaku,
42. Ismet Grajqevci,
43. Sanije Hashani,
44. Nazmi Raqi,
45. Vehbi Aliu,
46. Selman Berisha,
47. Shefqet Muli,
48. Bajram Syla, and
49. Avdullah Selimi;

b) *there has been violation of Article 31 of the Constitution* in conjunction with Article 6 of the European Convention on Human Rights with regard to the same Applicants who suffered violation of Article 46 of the Constitution as listed under IV.

III. ***Declares invalid the judgments delivered by the Supreme Court*** in the following cases:

13. Sahit Zekolli, Rev.no. 90/2008 dated 25.02.09
14. Ilaz Ademi, Rev.no. 229/2008 dated 10.02.09;
15. Ali Shala, Rev. no. 54/2009 dated 11.02.09;
16. Shefqet Feta, Rev. no. 487/2008 dated11.02.09;
17. Selatin Hashani, Rev. no. 59/09 dated 30.06.08;
18. Jetullah Grajqevci, Rev.no150/2009 dated 02.06.09;
19. Avdi Grajqevci, Rev.no. 227/2008 dated 11.02.09;
20. Avdyl Krasniqi, Rev.no. 476/2008 dated 23.02.09;
21. Milazim Shala, Rev.no. 574/2008 dated 11.02.09;
22. Musli Podvorica, Rev.no. 464/2008 dated 23.02.09;
23. Fikrete Hashani, Rev.no. 225/2009 dated 18.06.09;
24. Ferat Berisha, Rev.no. 138/2009 dated 02.06.09;
25. Ahmet Krasniqi, Rev.no. 426/2008 dated 10.02.09
26. Halit Mjeku, Rev.no. 567/08 dated 10.03.09;
27. Ali Baruti, Rev.no. 45/2009 dated 11.02.09,
28. Ibush Hashani, Rev.no. 97/2009 dated 17.03.09;
29. Avdyl Luta, Rev. no. 565/2008 dated 11.02.09;
30. Hevzi Demolli, Rev.no. 64/2009 dated 02.02.09;
31. Hajzer Zeqiri Rev. no. 518/2008 dated 23.02.09;
32. Hilmi Mehmeti, Rev.no.571/2008 dated11.02.09;
33. Mustaf Sahiti, Rev.no.259/2008 dated 23.02.09;
34. Bedri Salihu, Rev.no. 435/2008 dated 10.02.09;
35. Igballe Sallova, Rev.no. 545/2008 dated 23.02.09;
36. Bajram Krasniqi, Rev.no. 569/2008 dated. 23.02.09;
37. Murat Rafuna, Rev.no. 491/2008 dated 23.02.09;
38. Fadil Saraqi, Rev.no.506/2008 dated 23.02.09;
39. Rrahman Merlaku, Rev.no.441/2008 dated.10.02.09;
40. Zarife Shatrolli, Rev.no.454/2008 dated 23.02.09;
41. Sami Klinaku, Rev.no. 63/2009 dated 11.02.09;
42. Ismet Grajqevci, Rev.no. 479/2008 dated 23.02.09;
43. Sanije Hashani, Rev.no. 460/2008 dated 11.02.09;
44. Nazmi Raqi, Rev.no. 270/2009 dated18.06.09;
45. Vehbi Aliu, Rev.no. 269/2009 dated 01.07.09;
46. Selman Berisha, Rev.no. 41/09 dated 30.06.09;
47. Shefqet Muli, Rev.no. 222/2008 dated 10.02.09;

48. Bajram Syla, Rev.no. 142/2009 dated 17.03.09;
49. Avdullah Selimi, Rev.no. 438/2008 dated 10.02.09.

IV. **Remand these judgments to the Supreme Court** for reconsideration in conformity with the judgment of this Court

V. **Remains seized of the matter** pending compliance with that Order.

This Judgment shall have effect immediately on delivery to the parties.

Done at Pristina this day of 23rd June 2010.

Judge Rapporteur
Kadri Kryeziu, signed

President of the Constitutional Court
Prof. Dr. Enver Hasani, signed

Sami Sekiraqa vs. Decision S.C. AP. No. 448/2006 of the Supreme Court, and Decision D.C. P. No. 521/2005 of the District Court in Pristina

Case KI 16/09, decision of 23 June 2010
Keywords: individual referral, right to fair and impartial trial, right to effective legal remedies.

The applicant has filed a referral, claiming that his rights to a fair and impartial trial and to effective legal remedies were violated, because he was tried in absence, and that evidence did not support the pronounced sentence. At the same time, the applicant alleged that he was criminally prosecuted only because of his different political convictions from the political party in power.

The Constitutional Court decided to reject applicant's referral as inadmissible, thereby reasoning that allegations of the applicant were unfounded. Following a comprehensive assessment of procedures, the Court found that there was no evidence to suggest that previous proceedings were in any way unfair or affected by arbitrariness. Further, the Court maintained that the applicant had not filed any evidence which would *prima facie* demonstrate the violation of his right to a fair and impartial trial and to effective legal remedy.

Pristina, 23 June 2010
Ref. No.: RK 31/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 16/09
Sami Sekiraqa
vs.
The Decisions of the Supreme Court of Kosovo,
S.C. Ap.No. 448/2006, and of the
District Court of Pristina, D.C. P.No. 521/2005

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 Čukalovič, Judge
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Unanimously adopts the following resolution on inadmissibility

The Applicant

1. The Applicant is Mr. Sami Sekiraqa. He resides in Pristina.

The Challenged Decisions

2. The Supreme Court of Kosovo, S.C. Ap. No. 448/2006 of 12 December 2006, and of the District Court of Pristina, D.C. P. No. 521/2005 of 1 January 2006.

Subject Matter

3. The Applicant argues that his rights guaranteed by Articles 31 (right to a fair and independent trial) and 32 (right to legal remedies) of the Constitution of the Republic of Kosovo have been violated. He argues that: (1) he was tried in absence; (2) the evidence does not support his conviction and he was prosecuted because his political ideology differed from that of the ruling political party, the Communist Party.

Legal Basis

4. Art. 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of 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 Constitutional Court

5. On 30 April 2009 the Applicant filed his Referral with the Constitutional Court. On 4 May 2009 the Interim Secretary of the Constitutional Court notified the Applicant that the Court would consider his Referral once the Court was fully functional.

6. On 18 December 2009 the Constitutional Court sent a letter to the Supreme Court of the Republic of Kosovo, , requesting a response in relation to the Referral.

7. On 23 December 2009 the Supreme Court of the Republic of Kosovo registered its response, Decision Ap. Nr. 448/06, which included the Court's reasoning and explanation, as well as the public decision it provided to the parties.

8. On 26 January 2010 the President of the Court appointed Judge Altay Suroy as the Judge Rapporteur.

9. On 13 May 2010 the Review Panel, consisting of Kadri Kryeziu (presiding), Gjyljeta Mushkolaj, and Almiro Rodriques, considered the Report of Judge Suroy and recommended that the full Court reject the case as inadmissible.

The Facts

10. On 1 June 2006 the Applicant, Sami Sekiraqa, was found guilty by the District Court of Pristina of the criminal offense of unauthorized property, control, possession or use of weapons in accordance with Article 328, paragraph 1 of the Criminal Code of Kosovo. The Court pronounced a sentence of eleven months of imprisonment, and delayed its execution with a suspended sentence of two years provided that Mr. Sekiraqa did not commit any other criminal offense during the two year period. (D.C.P. No. 521/2005 of 01.06.2006).

11. The Public Prosecutor of the District of Pristina submitted an appeal of the criminal sanction to the Supreme Court of Kosovo on 18 August 2010.

12. The Applicant's attorney submitted an appeal to the Supreme Court of Kosovo.

13. On 12 December 2006 the Supreme Court of Kosovo rejected the appeals as inadmissible because the parties waived their right to appeal when they did not file the appeals within the legally required deadline. The court of first instance informed the parties of their right to appeal and their obligation to file their appeal within eight days of the Court's judgment, in accordance with Article 394, paragraphs 1 and 3 of the Criminal Procedure Code. (S.C. Ap. No. 448/2006 of 12.12.2006). According to Article 400, paragraph 2 of the Criminal Procedure Code, if a person entitled to appeal fails to file the appeal within the legally stipulated interval, he or she shall be deemed to have waived their right to appeal.

14. On 18 December 2008 the District Court of Pristina upheld the Applicant's request for removing his name from the sentence registry.

(D.C.P No. 215/2008 of 18.12.2008 (revised by D.C.P. No. 215/2008 of 22.12.2008).

Assessment of Admissibility of the Referral

15. The Applicant states that Articles 31 (right to a fair and independent trial) and 32 (right to legal remedies) of the Constitution are the bases for his Referral.

16. Article 113.7 of the Constitution states:

    Individual persons 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.

17. Article 48 of the Law on the Constitutional Court of the Republic of Kosovo states:

    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.

18. Under the Constitution, the Constitutional Court is not to act as a court of appeal, or a court of fourth instance, when considering the decisions taken by ordinary courts. It is the role of ordinary 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).

19. The Constitutional Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see among other 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).

20. The Applicant's argument that he was tried in absence is unfounded. Mr. Sekiraqa was present, along with his attorney, in the main session in the District Court of Pristina on 1 June 2010. Additionally, the Applicant's argument that his conviction is not supported by the evidence is unfounded. The Applicant and his attorney were afforded ample opportunities to state Mr. Sekiraqa's case and to contest the application of the law to the evidence, before both the District Court of Pristina and the Supreme Court of Kosovo. Having examined the proceedings as a

whole, the Constitutional Court does not find that the proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, Shub v. Lithuania, ECHR Decision as to the Admissiblity of Application no. 17064 of 30 June 2009).

21. Furthermore, the Applicant has not submitted any *prima facie* evidence indicating a violation of his rights under the Constitution (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005). The Applicant does specify how Articles 31 or 32 support his claim, as required by Article 113.7 of the Constitution and Article 48 of the Law.

22. It follows that the Referral is ill-founded and must be rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law, and Section 54(b) of the Rules of Procedures, unanimously, in its session of 23 June 2010:

DECIDES

I. To REJECT this Referral as inadmissible.

II. The Secretariat shall notify the Parties of the Decision and shall publish it in the Official Gazette in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy, signed	Prof. Dr. Enver Hasani, signed

Metush Haziri vs. Decision A. No. 2705/07 of the Supreme Court of Kosovo

Case KI 44/09, decision of 12 July 2010
Keywords: individual referral, right to pension

The Applicant submitted a referral against the Judgement of the Supreme Court of Kosovo which confirmed the decisions of administrative authorities which reject applicant's right to pension and disability pension. He claims that such a decision violated his right to pension not specifying or defining clearly which rights or freedoms of the Constitution have been allegedly violated and he has not provided any concrete fact to support the right he claims to have been violated.

The Constitutional Court, referring to the Law on Constitutional Court according to which a referral should be submitted within a period of four months, found the referral to have been submitted after the expiration of the deadline, thus rendering it inadmissible. Further, the Court decided that had it used its authority to review the referral, it would have rejected it as inadmissible with the reasoning that after reviewing administrative procedures it did not find procedures to have been unfair or impacted by arbitrariness since the applicant has not provided any evidence or relevant fact to indicate the violation of his constitutional rights.

Prishtinë, 12 July 2010
Ref. no. RK 35/10

DECISION ON ADMISSIBILITY
in
Case No. KI 44/09
Applicant
Metush Haziri
vs.
Judgment of the Supreme Court of Kosovo, A. Nr. 2705/2007

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

Unanimously adopts the following **Decision** on the inadmissibility of the case.

INTRODUCTION

Applicant

1. The Applicant is Mr. Metush Haziri, from Ferizaj

Challenged Decision

2. Judgment of the Supreme Court of Kosovo, A. Nr. 2705/2007, dated 10 March 2008.

Subject Matter

3. On 28 September 2009, Mr. Metush Haziri, from Ferizaj, submitted a referral in the Constitutional Court of Kosovo, registered under the number KI 44/09. The Applicant challenged the legality of the Judgment of the Supreme Court of Kosovo A. Nr. 2705/2007, on the rights to pension.

Legal Basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution); Article 20 of the Law Nr. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), as well as Article 55 of the Rules of Procedure of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Summary of Proceedings before the Court

5. The referral was submitted to the Constitutional Court on 28 September 2009. The President of the Court appointed Judge Iliriana Islami as Judge Rapporteur and established the review panel in the composition of Judge Altay Suroy, Presiding, Almiro Rodrigues and Gjyljeta Mushkolaj. On 16 June 2010, the Court reviewed the admissibility of the referral.

Facts

6. The Applicant has explained in his referral that he was employed in the state authorities from 15 March 1973 to 30 June 1989. Pursuant to

Article 39 of the Law on Basic Rights on Pension and Disability Insurance, BVI-Disability Pension Insurance, the Organizational Unit in Ferizaj has issued a Decision, NR-V-3468/7006799138, dated 10 July 1992, recognizing the Applicant's rights to old-age pensions, starting from 1 July 1989.

7. On 6 December 1989, the Committee for Administrative and Staffing Issues of the Executive Council of the Assembly of the ASP Kosovo, in line with Article 124 of the Law on Internal Affairs, according to which, "Every 12 months elapsed shall calculated as 16 months of experience for purposes of insurance for authorized officials", has issued a Decision, which rejects the request of the Applicant to reinstate him in his previous employment position.

8. After 1999 and the establishment of the Provisional Institutions of Self-Government, the Applicant filed a request and asked from the Department of Pension Administration in Kosovo, the Ministry of Labor and Social Welfare, to extend his right to pension, pursuant to the Decision NR. 3468/7006799138, dated 10 July 1992.

9. On 22 October 2007, the Complaints Unit of the Pension Administration of Kosovo, of the Ministry of Labor and Social Welfare replied to the complaint of the Applicant, and stated that according to the UNMIK Regulation No. 2000/10, the Administrative Department for Health and Social Welfare is not successor of the BVI-Pension and Disability Insurance of Kosovo. It also states that, with a separate Instruction, No. 3/2001, the Fund for Social Insurances of Kosovo has been established, and from 1 July 2002, basic pensions are provided by the Transitional Department of Social Welfare only for persons over 65 years of age, in the amount of 40 Euros.

10. It also, in the same reply, rejects the Applicant's request to disability pension, for the fact that after professional medical examinations, the results have shown that the Applicant has no full and permanent disability.

11. On 29 July 2008, the Pension Administration Department of Kosovo, Ministry of Labor and Social Welfare, replied to the Complaint of the Applicant on the old-age pension (pension earned based on contributions), and stated that the request of the applicant cannot be realized due to the absence of legal infrastructure and the lack of budgetary means;

12. On 10 March 2008, the Supreme Court of Kosovo issued a Judgment under the reference number A. nr. 2705/2007, holding that the

administrative bodies have not rightfully applied the applicable law in Kosovo and that the Plaintiff has not met the legal conditions for the recognition of the requested rights and, consequently, the Claim-suit is rejected as unfounded.

Assessment of the admissibility of the referral

13. In order to decide on the Applicant's Referral, the Court has to initially examine the available documentation and analyze if the Applicant has met the admissibility criteria, as envisaged in the Constitution. In this relation, the Court refers to Article 113.7 of the Constitution, which provides that:

    "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"

It is clear from the submitted documentation that the Applicant has exhausted all legal remedies provided with the law.

14. Article 48 of the Law provides that:

    "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."

The Applicant has not clearly specified or defined which rights or freedoms of the Constitution have been allegedly violated, and he doesn't provide any concrete fact to support the alleged violation of a right of the Constitution. Moreover, the Applicant has not provided any evidence – *relevant fact* – to demonstrate that the administrative or judicial bodies have made any violation of his rights guaranteed with the Constitution (see Vanek v. Slovak Republic, ECtHR Decision on Admissibility of the case No. 53363/99 dated 31 May 2005). Consequently, the Court **cannot** consider that the Applicant has met the criteria determined in Article 48 of the Law.

15. Article 56 of the Law provides that:

    "The deadlines defined in this Law for the initiation of procedures on matters that fall under the jurisdiction of the Constitutional Court and which have arisen before the entry into force of this Law shall begin to be counted on the day upon which this Law enters into force".

    Article 56 of the Law is related to Article 49 of the Law, shown below, which determines the deadlines in submission of individual referrals in

accordance with Article 113 (7) of the Constitution and Article 47 of the Law:

"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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced".

Hence, the Court observes that the Referral was submitted in the Constitutional Court on 28 September 2009, and the recent Decision in relation with this case was that of the Supreme Court of Kosovo, dated 10 March 2008, and the matter involves a period dating prior to the entry into force of the Constitution (see Blecic v. Croatia, referral No. *59532/00, Judgment of the* ECtHR, 29 July 2004), thus concludes that the referral is time-barred.

However, had also the request been submitted in a timely fashion, the Court has not found that any rights guaranteed with the Constitution have been violated.

THEREFORE, FOR THESE REASONS

After the Court has analyzed all facts and evidences submitted by the Applicant, and after reviewing the matter, in line with Article 113 (7) of the Constitution, Article 20 of the Law and Article 55 of the Rules of Procedure, unanimously, in its session of 12 July 2010:

DECIDES

I. **TO REJECT** the referral as inadmissible.

II. This Decision shall be sent to the parties and shall be published in the Official Journal, in line with Article 20(4) of the Law.

III. This decision shall enter into force immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr. Iliriana Islami, signed	Prof. Dr. Enver Hasani, signed

Jusuf Hashani vs. Decision Mlc. Nr .43/2007 and A. Nr. 874/08 of the Supreme Court of Kosovo

Case KI 48/09, decision of 16 July 2010
Keywords: individual referral, right to legal remedies, administrative dispute.

The Applicant has submitted a referral for assessing constitutionality of the decision of the Supreme Court rejecting applicant's claim regarding an administrative dispute, whereby he alleges that he was denied the right on legal remedies.

The Constitutional Court decided to reject applicant's referral as inadmissible with reasoning that it is untimely since the matter was still before the District Court in Pristina, thus all legal remedies that are available are not exhausted and applicant has not accurately clarified procedural or material aspects violated in the procedures mentioned by him.

Pristina, 16 July 2010
Ref.No.: RK 66/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI-48/09
Jusuf Hashani

Assessment of the constitutionality of the Supreme Court of Kosovo Resolution A Nr. 847/08 and Supreme Court of Kosovo Resolution Mlc Nr. 43/2007

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 Čukalovič, Judge
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Jusuf Hashani ,residing at 26-A Pashko Vasa Str, Pristina.

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo A.no.874/08, dated 28.08.2009 and the Decision of the Supreme Court of Kosovo Mlc no. 43/2007, dated 21.07.2009.

3. The Applicant claims that the Supreme Court of Kosovo, by REJECTING his suit concerning an Administrative Dispute for the assessment of legality of Decision 01 No. 07-5400, dated 26.05.2008, violated his constitutionally-guaranteed rights that he specified, in a general fashion, as violation of individual rights as per Article 113.7 of the Constitution and Article 47 of the Law on the Constitutional Court of the Republic of Kosovo.

4. In fact, the Applicant sought, through the suit before the Municipal Court of Pristina, the withdrawal of the contract on the gift of immovable property, entered into between the Applicant, in the capacity of gift transferor, and his son, Mr. Shemsedin Hashani, in the capacity of gift recipient, which latter on led to the dispute before the Supreme Court of Kosovo.

Legal basis

5. Article. 113 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article. 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of 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.

Summary of the proceedings before the Constitutional Court

6. On 05 October 2009, the Applicant lodged a Referral before the Constitutional Court. On 22 October 2009, the Court Secretariat informed the Applicant that his Referral was registered in the respective register as Case No.48/09, and that is shall be proceeded for adjudication in conformity with the Court's Rules of Procedure.

7. On 18 February 2010, the Constitutional Court sent a letter to the Supreme Court, requesting a reply in relation to the present referral.

8 On 03.03.2010, the Supreme Court submitted its reply in writing to the Constitutional Court of Kosovo, registered as No.AGJ 71/2010, which contained the Supreme Court's reasoning and clarification as well as the public decision served on the parties.

9 On 19.05.2010, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur for this case.

10 On 22.06.2010, the Constitutional Court sent a request in writing to the Municipal Court in Pristina, requesting the copies of the case file before the Municipal Court under the number 1266/07, and which concerns the civil dispute for the annulment of the contract on gift.

11. On 16.07.2010, following the review of the report by Judge Rapporteur Altay Suroy, the Review Panel, composed of Judge Kadri Kryeziu (presiding), Judge Almiro Rodrigues and Judge Ivan Čukalovič, presented its recommendation before the full Court to reject the referral as inadmissible.

Facts

12. On 28.02.2009, Mr. Jusuf Hashani from Pristina, in the capacity of the gift transferor, signed a contract on gift with his son, in the capacity of gift recipient, through which he granted him (the gift recipient) the immovable property evidenced in the possession list no.5971, cadastral zone Pristina, plot 6916/12, in the total area of 52 square metres. The contract was confirmed by the signatory parties before the Municipal Court in Pristina as no.VR.no.798/89, dated 24.03.1989.

13. On 22.05.2007, Mr. Jusuf Hashani filed a suit before the Municipal Court in Pristina, requesting the withdrawal of the contract on gift based on the reasoning that he was very impoverished and requested from the Court to adopt its suit and to restore him the immovable property in question.
14. This suit was filed before the Municipal Court in Pristina 17 years and 10 months after the legal deadline.

15. On 23.05.2007, i.e. on the next day, Mr. Jusuf Hashani filed before the Municipal Court in Pristina the request for the imposition of interim measure to prohibit the alienation of the immovable property in question and to prohibit any construction on the immovable property until the conclusion of the court process.

16 In its Decision 780/07, dated 30.05.2007, the Municipal Court imposed the interim measure prohibiting the debtor, Mr. Shemsedin Hashani, the

sale of the immovable property (house and courtyard) evidenced in the possession list no.5971, cadastral zone Pristina, plot 6916/12 in the place called "R.Gajdiku".

17 The debtor, Mr. Shemsedin Hashani, filed an objection within the legal deadline against the Decision imposing the interim measure, and requested the adoption of this objection. The Municipal Court in Pristina, through its Decision 780/07, dated 10.08.2007, suspended the previous Decision imposing the interim measure and terminated all executive proceedings.

18. The District Court in Pristina, it its Decision Ac. no. 748/2007, dated 30.10.2007, confirmed the Decision of the Municipal Court for the suspension of the interim measure and termination of all executive proceedings.

19. On 16.11.2007, Mr. Jusuf Hashani filed a Request for the Protection of Legality before the Public Prosecutor's Office of Kosovo against the aforementioned decisions of the Municipal and District courts.

20. On 04.12.2007, the Public Prosecutor's Office of Kosovo filed the Request for the Protection of Legality before the Supreme Court of Kosovo PCK. No.135/07.

21. The Supreme Court of Kosovo, acting as per the request of the Public Prosecutor's Office, in its Decision Mlc. no. 43/2007, REJECTED as inadmissible the request against the Decision Ac.no.748/2007 of District Court in Pristina, dated 30.10.2007, and the Decision E.no.780/2007 of the Municipal Court in Pristina, dated 10.08.2007, which means that practically and legally the matter of imposition of the interim measure was terminated with the aforementioned Decision of the Supreme Court.

22. The debtor, Mr. Shemsedin Hashani, considering that the annulment of the interim measure posed no legal obstacles for constructions in the property in his possession, on 06.11.2007 signed a contract on joint construction with Mr. Avni Maxhuni and both then filed a request for a construction license, which included the area that was the subject of the contract on gift. The request for a construction license was approved based on the Decision 05 no. 351-24646, dated 29.02.2008, by the Directorate of Urbanism, Cadastre and Protection of Environment of the Municipality of Pristina.

23. Mr. Jusuf Hasani, in the capacity of the interested party, filed a complaint before the Municipality of Pristina. The complaint was

rejected as ungrounded as per Decision 01 no.07-5400, dated 26.05.2008.

24. Dissatisfied with the final administrative decision of the Municipality of Pristina, Mr. Jusuf Hashani on 30.06.2008 filed a suit for Administrative Dispute before the Supreme Court of Kosovo.

25. The Supreme Court of Kosovo, deciding as per the filed suit, analysed all aspects of the suit and the presented facts by the parties in a detailed manner, and based on the foregoing it decided: TO REJECT THE SUIT.

26. The Constitutional Court of the Republic of Kosovo, in its official correspondence with the Municipal Court, was informed that the Court through Judgment C.no.1266/07, dated 11.06.2009, entirely rejected the claim-suit filed by plaintiff Jusuf Hashani for the annulment of the contract on gift, and that this case, pursuant to the appeal, is still before the District Court in Pristina as case no.AC-1167/09 and thus still unsettled.

Assessment of the Admissibility of the Referral

27. In order to be able to adjudicate the Applicants' Referral, the Court need first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this respect, the Court refers to Article 113.7 of the Constitution:

    "*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.*"

28. Article 48 of the Law provides that:

    "*In his/her referral, the Applicant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challe*nge."

29. From the submitted documentation in the referral, it appears that the Applicant did not exhaust all available legal remedies since his suit for the annulment of the contract on gift, which is the plaintiff's fundamental request, is still before the District Court in Pristina registered with the reference no. AC 1167/09 and is still unsettled.

30. The Constitutional Court of Kosovo concluded that the court proceedings, terminated based on Judgment A.no.874/2006 and

Decision Mlc 43/2007 of the Supreme Court, were auxiliary proceedings and were conducted for the matter related to the main subject of the suit, i.e., the annulment of the contract on gift, but in the meantime the civil dispute for the same matter (annulment of the contract on gift) is still unsettled.

31. In conformity with the Constitution, the Constitutional Court cannot act as an appeal court or a fourth instance court of review for decisions rendered by the regular courts. It is the task of regular court to interpret and implement the respective rules of the procedural and substantive law (see, *mutatis mutandis*, Garcia Ruiz v. Spain (GC), no. 30544/96, § 28, the European Court of Human Rights (ECHR 1999-I).

32. The Court notes that the rationale for the rule of exhaustion of legal remedies is to provide the respective authorities, including the courts, an opportunity to prevent or remedy the alleged violations of the Constitution. This rule is based on the assumption that Kosovo's legal order shall ensure an effective legal remedy for the violation of the constitutional rights (see, *mutatis mutandis,* ECHR, Selmouni v. France no. *25803/94*; Decision of 28 July 1999).

33. The Court also notes that a mere suspicion on the perspective of the matter is not sufficient to exclude an applicant from his obligations to appeal before the competent local bodies (see Whiteside v the United Kingdom, decision of 7 March 1994, Application no. 20357/92, DR 76, p.80).

34. Moreover, the Applicant did not specify the Referral nor did he justify the referral in the procedural or substantive aspects, in order to prove that constitutional rights had been violated.

FOR THESE REASONS

35. The Court, following the review of all facts and presented proofs, and following the review of the case on 16 July 2010, concluded that the Applicant did NOT exhaust all available legal remedies, and unanimously:

DECIDES

I. TO REJECT the Referral as inadmissible.

II. 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.

III.This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy , signed	Prof. Dr. Enver Hasani, signed

Sadik Shemë Bislimi

Case KI 62/09, decision of 28 July 2010
Keywords: individual referral, abstract control of constitutionality, *locus standi,* pension insurance, administrative dispute

The applicant filed a referral whereby it requested from the Court to “assess the legality of laws and fairness in the courts and administrative bodies” by providing different observations of social issues during the past decade as well as some events in his life. He posed a question to the Court as to “why the Law on Pension Insurance is not being applied?”, he then referred to an administrative dispute which he challenged at the Municipal Court in Ferizaj and no decision was taken for two years; then he challenged the constitutionality of RTK fee which is collected through electricity bills, the material damages which were caused by constant electricity cuts, and at the end he mentioned the petition of many citizens which was not taken into consideration by the Assembly of Kosovo, by asking for legal advice on how to protect the rights that have been denied to him.

By analysing each and every issue separately, the Constitutional Court decided that the petitioner in principle did not exhaust all legal remedies available and that he did not manage to provide sufficient evidence in order to prove that his individual rights guaranteed by the Constitution have been violated by the omissions of different instances mentioned by him. Hence, the court considered that the applicant requested for abstract control of constitutionality, which right according to Article 113.7 does not extend to individuals, and he thus lacks *locus standi* , and the court found the case inadmissible.

Pristina, 28 July 2010
Ref. No.: RK 59/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 62/09
Sadik Sheme Bislimi

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

Applicant

1. The Applicant is Mr. Sadik Sheme Bislimi, residing in Ferizaj.

Subject Matter

2. The Applicant filed a referral, requesting the Court "to assess legality of implementation of laws of justice in courts and Kosovo state administration bodies" .

3. In general, the Applicant points out his own view on the social and political events "during the last decade", without making a clear and complete case on a precise violation.

Legal Basis

4. Article 113 (7) of the Constitution of the Republic of Kosovo (hereinafter: "the Constitution"), Article 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. On 20 December 2009, the Applicant submitted the Referral to the Court, requesting the Court "to assess legality of implementation of laws of justice in courts and Kosovo state administration bodies".

6. On 16 July 2010, the Review Panel, consisting of Judges Snezhana Botusharova (Presiding), Ivan Čukalovič and Kadri Kryeziu, considered the Report of the Judge Rapporteur Almiro Rodrigues and made a recommendation to the Court on the inadmissibility of the Referral.

Facts

7. The Applicant alleges that, on 1 August 1992, he "was proclaimed invalidity pensioner with over 38 years of experience", receiving a pension based on contributions" which he paid until 15 August 1998.

8. From 15 August 1998 until 5 May 2003, he was denied such pension and from the date he reached 65 years of age, he "was given 25-40 Euros, only as charity, similar to those that never worked a day in their life, and had not paid any pension contributions. From 1 January 2007, he "was paid again 75 Euros of charity again on behalf of pension", and from 1 January 2008, he "was paid again charity of 80 Euros.

9. Furthermore, the Applicant alleges that, on 1 October 2001, he requested the Municipal Court to indemnify him "at the amount of 2,630.80 DM, or converted into Euros, 1,200.00 Euros".

10. On 8 February 2008, the Municipal Court in Ferizaj decided "to compensate the damage, but the party which had to pay for such compensation did not agree to such decision, and appealed the decision".

11. He further states that this case has been remaining with the second instance court in Pristina "for the last 2 years".

12. The Applicant refers to a Municipal Court in Ferizaj "dispute on purchase of land (...) for a parcel with a surface of 10.383 m2", where "this surface area is not defined properly".

13. The Applicant has transferred 1/3 of a parcel of 31.160 m2, which should be divided into 3 equal parts meaning that 1/3 of this area is 10.383 m2 and "this area does not appear".

14. Different geodesy experts assessed the terrain and provided the Municipal Court in Ferizaj with findings in written. In fact, on 18 March 2005, the first expert calculated the 1/3 of this area as coming to 09.000 m2.

15. Then, the Municipal Court in Ferizaj "proposed a super-expertise, with 2 other super-experts". These experts proposed the surface area to be 08.600 m2.

16. Therefore, "the case was decided in the favor of the plaintiff, at the area of 08.600 m2, and not how it should be, 10.383 m2".

17. Finally, the Applicant states that he has honored his contract on electricity services with KEK and regularly paid for the electricity spent, although KEK has caused priceless damages with irregular and poor electricity supply, involving electricity outages and without any warning to customers.

18. Regarding these alleged damages, the Applicant complained to the Director of KEK, apparently at least ten times, the last one being on 3

October 2009, which, according to the Applicant have remained without any reply.

19. He also “went to the Municipal Court in Ferizaj, with a claim suit sent by mail”, on 28 December 2007, alleging that “this is damage caused by poor electricity supply, and due to dozens of outages during a single day, without any warning, which means that KEK administration does not observe or respect the laws” and “does not perform on its obligations as provided by itself with the contract No. 10508, of date 27.02.2003”.

20. The Applicant also asserts that the collection of the 3.5 Euro RTK fee through electricity bills is unconstitutional. Applicant argues that he has neither consented nor contracted to receive RTK service and thus cannot be forced to pay the fee.

21. Finally, the Applicant claims that he was one of 10,000 citizens of Kosovo who signed a petition protesting a KEK price increase in mid-2009. Applicant asserts that the President of the Assembly ignored this petition, despite having a legal obligation to review it.

Applicant’s allegations

22. More precisely, the Applicant:

    a. questions “why for the last 10 years, the Law on Invalidity and Pension Insurance has not been approved”, as well as the Law on Health Insurance and Law on Labour. The Applicant considers that “pensions should be guaranteed by international laws, without consideration of the state where one gives contribution in work, and that pension should be paid back, as deserved”;

    b. claims that “an administrative dispute (...) was decided on 8 February 2008 [in the Municipal Court in Ferizaj] (...) but the party which had to pay for such compensation did not agree to such decision, and appealed the decision, and this case is being reviewed at second instance court in Pristina, which is still not finished, although this case was simple to decide”;

    c. refers to a Municipal Court in Ferizaj “dispute on purchase of land (...) for a parcel with a surface of 10.383 m2”, where “this surface area is not defined properly”;

    d. finally, requests the Court “to annul and reject the direction of senior leaders of 2003, making the KEK bodies to be servants, and collect

RTK fees of 3.5 euros a month, through electricity bills, starting from 1 November 2003, which is entirely unlawful".

23. The Applicant concludes stating: "I want legal remedies and advice on what should be done (...) to enjoy my denied rights".

Assessment of the admissibility of the Referral

24. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

25. In respect to the first issue, which is the question of why some laws have not been approved, the Court reiterates that individuals are authorized to refer to the Court violations by public authorities of their individual rights and freedoms guaranteed by the Constitution. However, they must fulfill the legally established requirements. Among them is the requirement: "only after exhaustion of all legal remedies provided by law". These words clearly show the restrictive character of the constitutional principle.

26. As to this complaint, the Applicant has not shown that he has exhausted any legal remedies available to him under applicable law or that such remedies would have been ineffective.

27. Furthermore, the Applicant does not convincingly present arguments neither that he has been directly and currently violated in his rights by a public authority nor does he point to a concrete final decision which has violated his rights and freedoms guaranteed by the Constitution.

28. In addition, the inexistence of a final decision of a concrete public authority leads to the conclusion that he is not an authorized party to raise the question on why some laws have not been approved. Therefore, this claim is inadmissible.

29. Concerning the second issue, which concerns the administrative dispute in the Municipal Court in Ferizaj, the Applicant states that this case has been pending in the second instance court in Pristina "for the last 2 years". Thus, it is clear that a final decision is still to be delivered and all legal remedies provided by law have not been exhausted yet. Therefore, the claim is inadmissible.

30. In respect to the third issue, which is the dispute regarding a parcel with a surface of 10.383 m2, the Applicant states that "the case was decided [by the Municipal Court in Ferizaj] in the favour of the plaintiff, at the area of 08.600 m2, and not how it should be, 10.383 m2".

31. It appears that no appeal is pending in another judicial instance and, thus, the decision is final. On the other side, the Applicant does not allege any precise violation nor attach the necessary supporting information and documents to prove that allegation. Apparently the Applicant didn't actually object or appeal against any violation and thus waived the right of invoking now such a violation, if any, before this Court.

32. Therefore, the Court concludes that the referral does not meet formal requirements for further proceeding and thus is inadmissible.

33. Finally, as to the last issue which concerns the collection of the RTK fee of 3.5 Euros through electricity bills, the Applicant does not accurately clarify what rights and freedoms he claims to have been violated.

34. The Applicant also provides no evidence that he has employed any of legal remedies regarding the RTK fee collection or the petition protesting the KEK price increase.

35. Thus, the Constitutional Court concludes that, in accordance with Article 22 (7) of the Law, this part of the Referral does not meet formal requirements for further proceeding. Therefore, the claim is inadmissible.

36. In sum, the Court finds that the claims contained in the Referral filed by the Applicant do not fulfill the requirements of admissibility established by Article 113 (1) and (7) of the Constitution, Articles 46 to 48 of the Law and Section 69 of the Rules of Procedure. Hence, the Referral is rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 48 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 shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues, signed	Prof. Dr. Enver Hasani, signed

Avdi Kastrati vs. Decision Ac. No. 540/09 of the District Court of Prizren

Case KI 53/09, decision of 29 July 2010
Keywords: individual referral, the right to fair and impartial trial, judicial protection of rights

The Applicant submitted the referral opposing the decision of the District Court which had decided to declare valid the decision of the Municipal Court which declared the applicant's contract of sale for the contested property between the seller and the applicant as the buyer rejecting the appeal he had made against the seller. He claims that with this decision his rights were violated by the lower courts' erroneous finding of fact and application of law, without specific reference to how these decisions infringed on his constitutional rights.

The Constitutional Court decided to reject applicant's referral as inadmissible with reasoning that applicant submitted any prima facie evidence indicating a violation of his rights under the Constitution, not specifying how Articles 31 and 54 of the Constitution support his claim.

Pristina, 29 July 2010
Ref. No.: RK 58/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 53/09
AVDI KASTRATI
vs.
DECISION OF THE DISTRICT COURT OF PRIZREN
AC.NO.540, DATED 8 JUNE 2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President;
Kadri Kryeziu, Deputy President;
Robert Carolan, Judge;
Almiro Rodrigues, Judge;
Snezhana Botusharova, Judge;
Ivan Čukalović, Judge;
Gjylieta Mushkolaj, Judge; and
Iliriana Islami, Judge.

unanimously adopts the following resolution on inadmissibility.

The Applicant

1. The Applicant is Avdi Kastrati of Prizren, Kosovo.

The Challenged Decision

2. Decision of the District Court of Prizren, Ac.No.540, of 8 June 2009.

Subject Matter

3. The Applicant claims that the District Court of Prizren through its decision Ac.No.540, dated 8 June 2009 violated the Kosovo Constitution by failing: (1) to guarantee equal protection of his rights in a court proceeding (Constitution Article 31.1); (2) to offer a fair and impartial hearing for the determination of his rights and obligations (Constitution Article 31.2); and (3) to offer judicial protection and effective legal remedy for his constitutionally guaranteed right to property (Constitution Article 54).

Legal Basis

4. Article 113.7 of the Constitution of the Republic of Kosovo, Article 20 of Law on the Constitutional Court of the Republic Kosovo, No. 03/L-121, ("the Law") and Section 54(b) of the Rules of Procedure of the Constitutional Court ("the Rules").

Summary of the Proceedings Before the Court

5. On 12 October 2009 the Applicant filed a Referral to the Constitutional Court.

6. The President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur. The President also appointed the Review Panel, consisting of Judges Snezhana Botusharova, presiding, Enver Hasani and Ivan Čukalovič. The Review Panel considered the Report of the Judge Rapporteur at private deliberations on 16 July 2010 and recommended the full Court to reject the Referral as inadmissible.

7. Judge Altay Suroy at one stage had acted as Attorney for one of the parties who was involved in the contested proceedings and recused himself from consideration of the matter.

The Facts

8. On 24 November 1997, Driton Xharra entered into an agreement with the Applicant to place a mortgage on Mr Xharra's immovable property

located in Prizren at Adem Jashari Street in the amount of 300.000 DM, being 225,000 DM for principal and 75,000 DM interest, for the period of one (1) year due on 1 December 1998 to secure the debt obligations of his friend, Fatmir Qollaku.

9. The Applicant drafted a contract of sale that stated Mr Xharra sold the property to the Applicant on 26 November 1997 for 300.000 DM, which the Applicant had paid in full and required Mr Xharra to transfer title, ownership, and possession of the property to the Applicant by 10 December 1999.

10. The contract was executed under the belief that it pertained to the previously discussed loan agreement that placed a mortgage on his property.

11. In the events that ensued Mr Xharra was unable to repay his debt of 300,000 DM to the Applicant by the stipulated deadline of the agreement.

12. On 24 June 2000, the Applicant entered into a new agreement with Mr Xharra concerning the original debt whereby Mr Xharra was obliged to pay the Applicant 330.000 DM by 01 December 2000, or Mr Xharra would forfeit possession, ownership, and title of the mortgaged property.

13. Mr Xharra reached a new agreement with the Applicant on 30 March 2002, which required Mr Xharra's brother-in-law Islam Kastrati to pay 230.000 DM to the Applicant and Mr Qollaku would assume the remaining debt of 100.000 DM. With the 230.000 DM payment, Mr Xharra was to be released of all his obligations to the Applicant.

14. As required by the new agreement, Islam Kastrati, on behalf of Mr Xharra, paid the 230.000 DM to the Applicant through his son, Agron Kastrati, on 31 March 2002. However, the Applicant refused to return the necessary documentation concerning the contested property to release Mr Xharra from his obligations, claiming that the debt of 100.000 DM remained.

15. Based on the filed contract of sale with the Municipal Court of Prizren under Leg.Nr.496/99 of 15 February 1999, the Applicant transferred title of the contested property into his name in 2007.

16. Mr Xharra initiated a suit against the Applicant for the contested property in the Municipal Court of Prizren which was heard on 29 April 2008.

17. The Municipal Court of Prizren ("Municipal Court") in decision C.Nr.670/07 issued a verdict "to approve in full the lawsuit of" Mr Xharra and declared the contract of sale for the contested property between Mr Xharra, as seller, and the Applicant, as buyer, filed with the Municipal Court of Prizren under Leg.Nr.496/99 of 15 February 1999 as "null and void". The Applicant was ordered to cover all procedural expenditures, legal expenditures for drafting the lawsuit, and interim measures expenditures.

18. The Municipal Court, *inter alia,* decided that:

    (1) the contract of sale of immovable property Leg.Nr.469/99 filed with the Municipal Court of Prizren was not a contract regarding a sale, but it was a loan contract for securing debt;

    (2) the contract of sale was fictive and did not concern a sale, but secured a debt;

    (3) Mr Xharra was deceived in believing the contract was a mortgage for securing debt, instead of a sales contract for his property; and,

    (4) all administered evidence concerned the debt and return of debt, and not the sale of the property;

19. The Applicant appealed the Decision of the Municipal Court to the District Court, which decided on 08 June 2009 to reject the Applicant's appeal. The District Court held that the facts in the record were confirmed and the substantive law applied with no essential violations of civil procedure or court regulations in the Municipal Court decision. Furthermore, as the Applicant confirmed the contested property had not been bought, but was instead placed under a mortgage to secure debt, the District Court held that Mr Xharra had repaid the debt.

20. Applicant filed a Referral to the Constitutional Court on 12 October 2009 to annul and void the District Court decision and remand the matter for retrial to the Municipal Court.

Assessment on the Admissibility of the Referral

21. The Applicant claims Article 31 (Right to a Fair and Impartial Trial) Paragraphs 1 and 2 and Article 54 (Judicial Protection of Rights) of the Kosovo Constitution are the basis for his referral.

22. Article 48 of the Law on the Constitutional Court of the Republic of Kosovo states:

"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."

23. Under the Constitution, the Constitutional Court is not to act as a court of appeal, when considering the decisions rendered by lower courts. It is the role of lower 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).

24. The Applicant has not submitted any *prima facie* evidence indicating a violation of his rights under the Constitution (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005). The Applicant does not specify how Articles 31 or 54 support his claim, as required by Article 113.7 of the Constitution and Article 48 of the Law.

25. The Applicant claims that his rights were violated by the lower courts' erroneous finding of fact and application of law, without specific reference to how these decisions infringed on his constitutional rights.

26. In the present case the Applicant was afforded ample opportunities to present his case and to contest the interpretation of the law which he considered incorrect, before the Ministry of Labour and Social Welfare and the Supreme Court. Having examined the proceedings as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see mutatis mutandis, Shub v. Lithuania, ECHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).

27. In conclusion, the Admissibility requirements are not met by this Referral. He has failed to state and support with evidence the constitutional rights and freedoms that were allegedly violated by the challenged decision.

28. It follows that the Referral is manifestly ill-founded and must be rejected.

FOR THESE REASONS

The Constitutional Court in its session of 29 July 2010, unanimously:

DECIDES

I. To REJECT this Referral as inadmissible.

II. The Secretariat shall notify the Parties of the Decision and shall publish it in the Official Gazette in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues, signed	Prof. Dr. Enver Hasani, signed

Naim Rrustemi and 31 deputies of the Assembly of Republic of Kosovo vs. His Excellency, Fatmir Sejdiu, President of Republic of Kosovo

Case KI 47/10, decision of 28 September 2010
Keywords: Referral submitted by 30 or more deputies, President, exercising political party function, serious violation of Constitution, continuing situation

Applicants, 32 deputies of the Assembly of Republic of Kosovo, submitted a referral to the Constitutional Court alleging that the President committed and continues to commit a serious violation of Article 88.2 of the Constitution, by holding the Office of the President of the Republic and, according to them, the Office of Chairman/President of Democratic League of Kosovo.

After submission of the referral signed by 31 deputies, the Court notes that three of deputies who were signatories had withdrawn their signatures, and this, in the opinion of President's representatives renders the referral inadmissible..... In addition to this, the opposing party in its reply also stated that deputies did not submit their request within the deadline required under the Constitution and ultimately, that President did not "exercise" his function in the stated political party but that he had "frozen" that function.

The Constitutional Court decided to declare the referral admissible with the reasoning that the matter is "referred [to the Court] in a legal manner by the authorized party" and the moment of referring the matter is the moment when it is decided if applicant is an authorized party. Furthermore, the Court recalled that even after a party withdraws, the Court could choose to decide on the referral. Regarding the deadline of 30 days from the violation as foreseen under the Constitution, the Court considered that the alleged violation of the President presents a continuing situation since the President continues to hold those two offices even at the time when referral is submitted. Court decided that there was a violation of Article 88.2 of the Constitution in holding of the two above mentioned functions, with reasoning that it is not possible to "freeze" a party function. Furthermore, the Court decided that since the above mentioned President and party "benefit from their association with one another", means that this party function was "exercised".

Pristina, 28 September 2010
Ref. No.: AGJ 43/10

JUDGMENT

Case No. KI 47/10
Naim Rrustemi and 31 other Deputies of the Assembly of the Republic of Kosovo
vs.
His Excellency, Fatmir Sejdiu, President 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

The Applicants

1. The Applicants are Naim Rrustemi and 31 other deputies (See Appendix A) of the Assembly of Kosovo

The Responding Party

2. The responding party is His Excellency, Fatmir Sejdiu, President of the Republic of Kosovo.

Legal Basis

3. Article 113 (6) of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"); Article 44 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(a) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Procedure before the Constitutional Court

4. On 25 June 2010 Naim Rrustemi and 31 other deputies of the Assembly of Kosovo lodged a Referral with the Constitutional Court concerning whether the President of Kosovo had committed a serious violation of the Constitution by continuing "to also hold concurrently and at the same time (sic) the function of the President of the Democratic League of Kosovo (LDK), thus acting in contradiction with the Constitution of the Republic of Kosovo."

5. Pursuant to the Rules of Procedure and by letter dated the 29 June 2010 the Court sent the Referral to the President requesting his response.

6. Pursuant to the Rules of Procedure the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and appointed the following Judges as members of the Review Panel: Judges Snezhana Botusharova (presiding), Kadri Kryeziu (Deputy President) and Gjyljeta Mushkolaj.

7. The following is the sequence of correspondence received by the Court from a number of Members of the Assembly of Kosovo who were signatories to the Referral.

   i. *29 June 2010:* Deputies Dragisa Miric, Mihailo Scepanovic and Vladimir Todorovic signed Information addressed to the Court withdrawing their signatures regarding this petition. This document had space for a fourth name, Numan Balic, but the document did not contain his signature.

   ii. *2 July 2010:* Another Deputy, Berat Luzha delivered to the Constitutional Court a Statement withdrawing his signature from the list of Deputies. He stated that he was aware and convinced about the violation of the Constitution by the President and he sought to withdraw to avoid the creation of political crises.

   iii. *5 July 2010:* The Constitutional Court received a letter from Muzejene Selmani who informed the Court that she "withdraws his signature" from the Petition.

8. A response was received from the Legal Advisor of the President in the Office of the President, dated 15 July 2010.

9. The Court wrote to the Central Elections Commission (CEC) by letter dated 7 July 2010 and the CEC replied to the Court on 22 July 2010.

10. The full Court deliberated in private on the Referral on 22 September 2010.

Summary of the issues before the Court

11. Article 113.6 of the Constitution provides as follows;
Thirty (30) or more deputies of the Assembly are authorized to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution.

12. 32 deputies of the Assembly of Kosovo signed the Referral. They allege that the President of the Republic had violated and continued to violate Article 88.2 of the Constitution which prohibits the President from exercising any political party functions. They also allege that such a violation is a serious violation of the Constitution.

13. Article 88, in its entirety provides as follows:

1. The President shall not exercise any other public function.

2. After election, the President cannot exercise any political party functions.

Arguments presented by the Applicants.

14. The referral claims that at the local elections of 17 November 2009 the LDK participated as a registered party. The Referral stated that pursuant to the Law on Local Elections, applying the Law on General Elections Law No. 03/L-073, *mutatis mutandis*, the registration of a Political Party must include the position of President and that changes in the political party's President shall be reported to the Central Elections Commission.

15. The Referral also invoked UNMIK Regulation 2004/11, Article 12 and other unspecified Articles, as requiring a Political Party to have a President. This Regulation was effectively repealed but then re-enacted by the Law on General Elections dated 5 June 2008.

16. The Referral states that the fact of not presenting anyone else as the President of LDK leads the deputies to reach the conclusion that the party had as its elected President, since 9 October 2007, Mr Fatmir Sejdiu, the President of the Republic of Kosovo.

Response of the President

17. The Response of the President raised three main defenses to the Referral:

i. The Deputies did not fulfill the criteria to be an authorized party in accordance with Article 113.6 of the Constitution;

ii. The Referral was not submitted within the time limit required by Article 45 of the Law on the Constitutional Court, Law No. 03/L-121; and

iii. The President has not exercised any function in a political party; therefore, he has not committed a heavy/serious violation of Article 88.2 of the Constitution.

18. In relation to the argument that the Applicants did not have the legal standing to bring the Referral to the Constitutional Court the President argued that the withdrawal of the Deputies, referred to in paragraph 7 above, reduced the number of number below 30 and that therefore there were not sufficient numbers for the remaining group of Deputies to be considered an authorized party as required by Article 113.6 of the Constitution.

19. Article 45 of the Law provides as follows:

Article 45
Deadlines

> *The referral should be filed within a period of thirty (30) days starting from the day the alleged violation of the Constitution by the President has been made public.*

20. In relation to the argument about whether the Referral was made within the 30 day time limit as required by Article 45 of the Law the President argued that "the 30 day time limit begins counting from the moment when the challenged act has been made public, irrespective of the fact when such act occurs once or is a continued act." He argues that any of his acts that were made public earlier than 26 May 2010, being 30 days prior to the date the Referral was lodged with the Court, are no longer subject to challenge.

21. The President asserts that he wrote to the LDK Council as early as 28 December 2006, following his election by the Assembly of Kosovo as President of Kosovo notifying the Council of his decision to "freeze his exercising the function of Chairman of LDK." This election was ten months earlier on 10 February 2006, at a time when the Constitution of Kosovo was not in force.

22. He states that following the entry into force of the Constitution on 15 June 2008 he once again made public his decision to freeze "the exercising of the function of the Chairman of the Democratic League of Kosovo" by way of letter sent to the Council of the Democratic League of Kosovo on 16 June 2008. Thus, he states, the act that is alleged to be unconstitutional was made public since the dates of those two letters.

23. Alternatively, he states that if the claim of the violation is based on the date of the Local Elections, 17 November 2009, his decision to hold the post of Chairman of the LDK, but to "freeze the exercising" of the function, was known to the public at that time and the time limit for bringing the Referral was 17 December 2009, thirty days after the November 2009 elections.

24. In relation to the substantive issue the President sought to argue that a better framing of the issue before the Court would be as to "whether the freezing of the exercising of a party function, but the holding of the same by the President of the Republic, is a serious/heavy violation of the Constitution of the Republic of Kosovo." He argued that the freezing of the exercise of the party function irrespective of the holding of the same function denotes the avoidance of the serious violation of the Constitution.

25. He argued that Article 88.2 requires that the President ***not exercise*** (his emphasis) any political party function, but does not require the President after the election ***not hold*** (his emphasis) any party function. He laid emphasis on the significant difference between "holding" and "exercising" a function. He compared the role of one of the Deputy Presidents of the Assembly who would serve as President of the Assembly if the President were absent or unable to exercise the function of President of the Assembly. He also quoted the "acting" role of the President of the Assembly if the President of the Republic were unable to fulfill his/her responsibilities. He also pointed out that the President of the Constitutional Court may delegate to the Deputy President certain duties to support the President in performing his/her duties.

26. With regard to the exercising of the party function as prohibited by Article 88.2 the President maintained that there was not a shred of evidence that he had undertaken any unconstitutional act.

27. He maintained that the word "exercise" in the legal sense is defined as "making use of" or "put into action". In support of this he quoted Black's Law Dictionary (online 8th edition). Thus, he argued, to exercise a function one needs more than holding it, there needs also to be action.

28. In relation to the lodging by the LDK of party documentation with the Central Election Commission the President maintains that this was an act performed by the LDK and not by him. He says that the lodging of these documents was an act by LDK and that it cannot be attributed to him. He maintains that it is inconceivable to understand how he could be responsible for the actions of another, in this case the LDK, when the test for constitutionality for the dismissal under Article 91.3[1] of the Constitution has to do with the Acts of the President when "***he/she***" (his emphasis) has seriously violated the Constitution.

29. The President further argues that because the term "serious violation" is not defined in the Constitution it should be considered actions in contradiction or omissions related to the competencies of the President as enumerated in Article 84 of the Constitution (dealt with below). Thus the President maintains that the freezing of the exercise of the position of Chairman/President of the LDK is not a violation of constitutional article and is far from being a heavy/serious violation of the Constitution.

Assessment of the admissibility of the Referral

Time

30. The question that arises to be considered is whether the passing of thirty days from the making public of his decision to hold the position of President/Chairman of the LDK, "but to freeze the exercise of the function", is an outright bar to bringing the Referral. To consider this issue the Court should decide whether the holding of the office of President/Chairman of the LDK is a continuing situation that remains in violation of the Constitution every day that the President holds both offices or if it is an isolated event. If it is considered an isolated event, it would have required the deputies of the Assembly to make the Referral prior to 17 December 2009, 30 days after the holding of the Local Elections or the President's letter of 16 June 2008.

31. The commission of a serious violation of the Constitution by any President is contemplated in Article 88.2 of the Constitution and a special mechanism is established to ensure that such violations are dealt with at the highest level i.e. before the Constitutional Court. No other holder of a Constitutional office is subject to such oversight. It is only

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[1] Constitution of Kosovo, Article 91.3. "If the President of the Republic of Kosovo has been convicted of a serious crime or if the Assembly in compliance with this article determines that the President is unable to exercise her/his responsibilities due to serious illness, or if the Constitutional Court has determined that he/she has seriously violated the Constitution, the Assembly may dismiss the President by two thirds (2/3) vote of all its deputies.

the actions of the President that may be referred for such consideration. This is likely to be a reflection of the importance of the position of the President within the constitutional framework and the necessity that this role is properly exercised.

32. In the case of President Sejdiu it is necessary to look at the factual situation to see whether the holding of the office of President/Chairman of the LDK, "but freezing that position", was a single event that occurred at one time or whether it amounts to a continuing day by day situation. If the latter, then there is no time limit within which the deputies ought to bring a Referral to the Court in relation to his alleged violation. Moreover, the fact of "holding and freezing" the position, seems to imply that the freezing of the position remains in effect all the time. The President admits that he has continued to be the Chairman of LDK and President of Kosovo at all times since his election to the office of President in 2006.

33. If this is the case, the consequences of the freezing of the position continue and therefore there is a day by day ongoing situation. To conclude otherwise could result in a situation whereby the President of Kosovo could be barred from holding the Office of the President because of a constitutional violation, but be allowed to continue in office simply because a referral was not made to the Constitutional Court in a timely manner. Nowhere in the Constitution is there any authority for such an irrational result. Nor does Article 45 of the Law on the Constitutional Court envision such an irrational result.

34. This Court considers that the time limit of 30 days set by Article 45 of the Law on the Constitutional Court, for referral of serious violations to the Constitutional Court, applies to serious violations that were "one off" events in time or were continuing violations that ceased. The time cannot apply to serious violations that continue. However where a violation is continuing the thirty days cannot commence to run because the violation has not ceased. If the President had at some stage in his Presidency resigned from the position of Chairman/President of the LDK then the time limit for making the Referral to the Constitutional Court, into what was then a past violation, would expire after the passing of 30 days from the date of that resignation. In contrast, the simple act of publicly stating that he was "freezing" his position as President of LDK at a definite point of time and then into the future cannot cure the continuing nature of the violation.

35. The reality is that the position remains "held and frozen" as maintained in the President's response. The Court therefore finds that the ongoing situation continues to this day and that, therefore, the 30 day time limit set by Article 45 of the Law does not apply in this case.

Authorized Party

36. Article 113.6, quoted above at paragraph 11, undoubtedly requires 30 or more deputies of the assembly to refer the question of whether the President has committed a serious violation. It is recorded that 32 such deputies made and joined in the Referral to the Court. It is therefore clear that on 25 June 2010 there was a valid Referral before the Court.

37. The Court has also set out above the manner and dates of the purported withdrawal of some Deputies from the Referral. The Court will not speculate as to the motives behind why Deputies might choose to sign an original Referral to the Court or as to why they choose to withdraw their signatures from the Referral.

38. The Court is cognizant that the making of a Referral is a matter of some constitutional and political importance. The Deputies who originally signed the Referral could not but be aware of that importance. They are also aware of the collective nature of the Referral in that this had to be a joint enterprise by a minimum of 30 Deputies. On 25 June 2010 the original 32 Deputies were of the view that this important question should be referred to the Constitutional Court. Perhaps there were others who might have signed it, perhaps not. The important point is that the Referral was made with the required number of signatures and it was therefore pending with the Court on that date.

39. Article 23 of the Law on the Constitutional Court provides:

    The Constitutional Court shall decide on matters referred to it in a legal manner by authorized parties notwithstanding the withdrawal of a party from the proceedings.

In its ordinary meaning this Article obliges the Court to decide matters referred in a legal manner. This is emphasized by the use of the word "shall".

40. The Rules of Procedure of the Constitutional Court elaborate on the issue of withdrawal in the following terms:

<u>Section 32</u>

Withdrawal of Referral

(1) A party which has filed a referral may withdraw the referral any time before the beginning of a hearing on such referral.

(2) Irrespective of a withdrawal pursuant to paragraph (1), the Court may determine to decide on the referral. In such event, the Court shall decide without a hearing on the basis of the referral and a reply, if any, and any documents attached thereto.

(3) The Secretariat shall inform all parties in writing of a withdrawal by a party and of a determination by the Court to decide on the referral despite withdrawal of the referral.

41. This Rule acknowledges that a party may withdraw a Referral at any time before the beginning of a hearing but it gives discretion to the Court to determine the referral. The Rule is silent as to the circumstances which would influence whether or not to exercise that discretion.

42. In the present case it is argued by the President that the purported withdrawal of the signature of certain Deputies from the Referral, to the extent that the number of supporters falls below 30, means that the group can not be considered an authorized party as required by Article 113.6 of the Constitution. The response of the President does not address the Court's obligation under Article 23 of the Law to decide on matters referred to it in a legal manner nor does his response address Section 32 of the Rules.

43. This Referral differs from a Referral from an individual person or other legal or natural person. It is required to be made by a minimum of 30 Deputies. No single Deputy or even a few Deputies has or have the authority to speak for all of the Deputies who initially requested the referral. Only the Deputies as a group, with 30 Deputies being the minimum number allowed to file a referral, can be the authorized party making the referral. Similarly, only all of the Deputies who initially signed the Referral can make a request to withdraw the referral once it has been filed. It could happen that some Deputies could seek to withdraw their signatures from the Referral and, knowing that they had done so, other Deputies could seek to add theirs in substitution. Would the addition of some new Deputies cure the withdrawal of others? Would it require a new Referral entirely to be made or would the old Referral lie in abeyance until new signatures were added? The unsatisfactory nature of such a situation is adequately dealt with by Article 23 of the Law on the Constitutional Court which clearly gives continued life to a Referral, when properly made, until the Court determines the matter.

44. An allegation of the commission of a serious violation of the Constitution by the President of the Republic is a grave matter and the Court can take judicial notice that the Deputies who signed the Referral certainly

thought so when they appended their signatures to it. Similarly, they should not now be allowed to withdraw their signatures without articulated, serious and substantial reasons.

45. All of the Deputies who submitted the original Referral acted in concert in a joint enterprise which became complete when lodged with the Court on 25 June 2010. The wishes of one, two, three or more individual Deputies who might now wish to withdraw their signatures, without substantial cause shown, can have no legal effect on the legality of the Referral made.

46. The Court therefore finds that on 25 June 2010 the matter was properly referred to the Constitutional Court. The Court was seized of it on that date and it remains seized of it until Judgment is given.

47. The Court therefore decides that the case is admissible.

The Merits

48. The substance of the Referral refers to Article 88.2, quoted above, as to whether the President, after his election as President, exercised any party political function. To come to a conclusion on this issue it is necessary to examine the role of the President in its entirety within the constitutional framework. The Constitution has to be read in a holistic manner and the Court must interpret its provisions having regard to the interdependent nature of its varied provisions.

Role of the President

49. Article 83 of the Constitution refers to the status of the President as head of state. It provides:

    The President is the head of state and represents the unity of the people of the Republic of Kosovo.

50. Article 4 goes further than this when describing the form of government of the Republic and it states:

    1. Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided in this Constitution.

    2. The Assembly of the Republic of Kosovo exercises the legislative power.

3. The President of the Republic of Kosovo represents the unity of the people. The President of the Republic of Kosovo is the legitimate representative of the country, internally and externally, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution.

51. The functions and competencies of the President within the constitutional framework are extensive and they are, partly, set out in Article 84 of the Constitution.

    They are as follows:

    The President of the Republic of Kosovo:

(1) represents the Republic of Kosovo, internally and externally;
(2) guarantees the constitutional functioning of the institutions set forth by this Constitution;
(3) announces elections for the Assembly of Kosovo and convenes its first meeting;
(4) issues decrees in accordance with this Constitution;
(5) promulgates laws approved by the Assembly of Kosovo;
(6) has the right to return adopted laws for re-consideration, when he/she considers them to be harmful to the legitimate interests of the Republic of Kosovo or one or more Communities. This right can be exercised only once per law;
(7) signs international agreements in accordance with this Constitution ;
(8) proposes amendments to this Constitution;
(9) may refer constitutional questions to the Constitutional Court.
(10) leads the foreign policy of the country;
(11) receives credentials of heads of diplomatic missions accredited to the Republic of Kosovo;
(12) is the Commander-in-Chief of the Kosovo Security Force;
(13) leads the Consultative Council for Communities;
(14) appoints the candidate for Prime Minister for the establishment of the Government after proposal by the political party or coalition holding the majority in the Assembly;
(15) appoints and dismisses the President of the Supreme Court of the Republic of Kosovo upon the proposal of the Kosovo Judicial Council;
(16) appoints and dismisses judges of the Republic of Kosovo upon the proposal of the Kosovo Judicial Council;
(17) appoints and dismisses the Chief Prosecutor of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council;

(18) appoints and dismisses prosecutors of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council;
(19) appoints judges to the Constitutional Court upon the proposal of the Assembly;
(20) appoints the Commander of the Kosovo Security Force upon recommendation of the Government;
(21) with the Prime Minister, jointly appoints the Director, Deputy Director and Inspector General of the Kosovo Intelligence Agency;
(22) decides to declare a State of Emergency in consultation with the Prime Minister;
(23) may request meetings of the Kosovo Security Council and chairs them during a State of Emergency;
(24) decides on the establishment of diplomatic and consular missions of the Republic of Kosovo in consultation with the Prime Minister;
(25) appoints and dismisses heads of diplomatic missions of the Republic of Kosovo upon the proposal of the Government;
(26) appoints the Chair of the Central Election Commission;
(27) appoints the Governor of the Central Bank of the Republic of Kosovo who will also act as its Managing Director, and appoints the other members of the Bank's Board;
(28) grants medals, titles of gratitude, and awards in accordance with the law;
(29) grants individual pardons in accordance with the law;
(30) addresses the Assembly of Kosovo at least once a year in regard to her/his scope of authority.

52. Apart from the Article 84 competencies there are a great number of references to the President throughout the Constitution. Power, functions, duties and competencies are set out in many other Articles. These Articles are, 4, 18, 60, 66, 69, 79, 80, 82, 93, 94, 95, 104, 109, 113, 114, 118 126, 127, 129, 131, 136, 139, 144, 150 and 158. Some of these Articles deal more thoroughly with the competences mentioned in Article 84, other Articles give competences to the President that are not so mentioned. For example, Article 84.1 and 84.2 repeat substantially what is contained in Article 4.3. However Article 79, where the President is given the power to initiate legislation, is not mentioned in Article 84 at all.

53. Some of the competences of the President are limited, in that the President may not exercise a particular function on his own initiative. Examples of these are:

i. under **Article 84 (15)** and (**16)** where the President appoints and dismisses the President of the Supreme Court and other Judges under the proposal of the Kosovo Judicial Council and

ii. under **Article 84 (17)** and **(18)** where the President appoints and dismisses the Chief Prosecutor and prosecutors upon the proposal of the Kosovo Prosecutorial Council, and

iii. under **Article 93.8**. the President must act on the recommendation of the Government in the appointment and dismissal of the heads of diplomatic missions

iv. under **Article 158** the President appoints the Governor of the Central Bank following consent of the International Civilian Representative, pending the end of the international supervision of the implementation of the Comprehensive Proposal for Kosovo Status Settlement, dated 26 March 2007

54. There are many examples, however, where the President has an independent role and where he may act on his own initiative without reference to other constitutional or statutory offices or officers. Some examples of these are under Article 69.4 where the President may convene an extraordinary meeting of the Assembly of Kosovo or where the President appoints the Chairperson of the Central Elections Commission from among the Judges of the Supreme Court under Article 139.

55. Some of the more important powers of the President touch very closely upon the political life of the country. Under Article 95.1 the President *"proposes to the Assembly a candidate for Prime Minister, in consultation with the political party or coalition that has won the majority in the Assembly necessary to establish the Government."*

56. Article 95.4 provides:

    If the proposed composition of the Government does not receive the necessary majority of votes, the President of the Republic of Kosovo appoints another candidate with the same procedure within ten (10) days. If the Government is not elected for the second time, the President of the Republic of Kosovo announces elections, which shall be held not later than forty (40) days from the date of announcement.

57. Similarly, if the Prime Minister resigns or if for any other reason the office of becomes vacant, Article 95.5 provides that the President *"appoints a new candidate in consultation with the majority party or coalition that has won the majority in the Assembly to establish the Government."*

58. Under Article 60 the Consultative Council for Communities acts under the authority of the President.

Law on the President

59. The Law on the President of the Republic of Kosovo, Law No. 03/L-094 was passed on 19 December 2008 and was published in the Official Gazette on 25 January 2009.

60. Article 1 of that Law provides that the President is the head of State and represents the unity of the people of the Republic of Kosovo.

61. Article 5 of that Law sets out the form of the oath that the President gives before the Assembly, It is as follows:

    "*I swear to commit all my powers to the preservation of independence, sovereignty and territorial integrity of Republic of Kosovo, to ensure human and citizen rights and freedoms, to respect and protect the Constitution and the laws, to maintain peace and welfare of all citizens of Republic of Kosovo and to conduct all my duties with consciousness and responsibility".*

62. Article 7 of that Law, quoted immediately below, reflect the provisions of Article 88 of the Constitution.

Inconsistency

1. *President may not exercise any other public function.*

2. *After election, the President may not exercise any function within a political party."*

Analysis of the position of the President

63. The LDK is well represented in the Assembly of Kosovo. It participated actively in the Local Elections held in Kosovo on 17 November 2009. Its members are engaged on political discourse, discussion and disputes on a daily basis. The party has its political aims and is entitled to aspire to political office to advance those aims. In a democracy such as that of Kosovo political parties are given special recognition in the law. They are entitled to appeal to the citizens to vote for them and their selected candidates at election time. They are entitled to negotiate coalitions at the national level in the Assembly and in Municipalities in all parts of the Country.

64. Political parties advance their aims not just by being active in discourse in the political sphere but also by supporting candidates aspiring to political office. One of the ways that they persuade the electorate to vote

for them is by the publication of their parties' aims and manifestos. They also do so by choosing candidates for election and by electing to office in their parties persons who will influence the electorate to vote for their candidates and their lists.

65. If one concludes that the stated public position of the President is correct, in that he has "frozen" the exercising of the function of the Presidency of his party, then the Court must consider what the reality of this freezing is. It is not the same as a Civil Servant of the Government taking a "leave of absence" from his or her technical civil service position to pursue an elected political career. It is the President of the Republic attempting to take a "leave of absence" from his or her position as Chairman of a major political party while still holding the official title of Chairman/President of that political party.

66. Political parties as their principal function wish to win support from citizens and influence people with respect to political issues and to win elections. One of the fundamental ways of winning the hearts and minds of the citizens who will vote in elections is the ability of a political party to be able to assert who is supportive of and will endorse the parties' positions and candidates. If a political party has the endorsement of the President of the Republic, it has a substantial political asset to further its political agenda and the election of its candidates for public office.

67. When the President of the Republic allows a political party to claim that he or she is the Chairman of their political party even under circumstances where he or she as Chairman will not make any active decisions on behalf of the party, he or she is exercising a political activity or at least allowing the political party to "make use of" of his name and position as President of the Republic. The President has continued to permit his name to be associated with the LDK. LDK has permitted him to remain as their President and has permitted him to "freeze" the exercise of the functions of that party.

68. In reality, both the President and the LDK wish to benefit from their association with each other. The President may be able to "unfreeze" his exercising of the functions if and when he leaves the office of the President of Kosovo. The party may seek political advancement by being associated with a powerful constitutional officer, the President of the Republic of Kosovo. The symbiotic relationship remains between the President and his party to this day. They thus "make use of" each other by permitting this public association to continue. This "making use of" is one of the definitions for "exercise" that the President offers in his response.

69. In considering whether this violation is merely a technical violation of the Constitution or rather a serious violation the Court should assess the impact of the President's decision on the confidence of the public in the office of President of the Republic of Kosovo. Bearing in mind the considerable powers granted to the President under the Constitution is it reasonable for the public to assume that their President, "representing the unity of the people" and not a sectional or party political interest, will represent them all. Every citizen of the Republic is entitled to be assured of the impartiality, integrity and independence of their President. This is particularly so when he exercises political choices such as choosing competing candidates from possible coalitions to become Prime Minister.

70. The Court is of the view that this cannot be said when the President still holds high office in one of the most prominent political parties in the country and it concludes that the President has committed a serious violation of the Constitution under Article 88.2 of the Constitution by continuing to permit himself to be recorded as President of the LDK.

FOR THESE REASONS

The Constitutional Court by majority vote, in its session of 28 September 2010:

DECIDES

I. That the Referral is admissible.

II. That there is a serious violation of the Constitution of Kosovo namely, Article 88.2, by His Excellency, Fatmir Sejdiu holding the office of President of the Republic and at the same time holding the office of Chairman/President of the Democratic League of Kosovo.

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. The Decision is effective immediately and may be subject to editorial revision.

In addition Judge Almiro Rodrigues and Judge Snezhana Botusharova announced that they would issue dissenting opinions which will be published by the Court in due course.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan , signed	Prof. Dr. Enver Hasani, signed

Appendix A

	Name	**Surname**
1.	Naim	Rrustemi
2.	Driton	Tali
3.	Ibrahim	Selmanaj
4.	Shkumbin	Demaliaj
5.	Ali	Lajçi
6.	Naser	Rugova
7.	Slaviša	Petković
8.	Qamile	Morina
9.	Ismajl	Kurteshi
10.	Donika	Kadaj
11.	Ahmet	Isufi
12.	Dritë	Maliqi
13.	Mark	Krasniqi
14.	Synavere	Rysha
15.	Emrush	Xhemajli
16.	Melihate	Tërmkolli
17.	Zafir	Berisha
18.	Xhevdet	Neziraj
19.	Haki	Shatri
20.	Gani	Geci
21.	Vladimir	Todorović
22.	Berat	Luzha
23.	Numan	Balić
24.	Heset	Cakolli
25.	Gjylnaze	Syla
26.	Ardian	Gjini
27.	Lulzim	Zeneli
28.	Mihailo	Šćepanović
29.	Dragiša	Mirić
30.	Suzan	Novoberdaliu
31.	Nait	Hasani
32.	Besa	Gaxherri

The Referral of the President of the Republic of Kosovo, his Excellency Dr. Fatmir Sejdiu, for clarification of competencies in the case of Mayor of Rahovec Mr. Qazim Qeska

Case KO 80/10, resolution of 7 October 2010
Keywords: referral submitted by a legal entity, general principles of Local Governance and Territorial Organisation, election and participation rights, election of mayor, termination of the mandate and discharge of the mayor, the concept of local governance, election and participation rights

The President of Kosovo filed a referral requesting from the Court a clarification as to which institution "...is responsible to assess the effectiveness and validity of a resignation and assess an eventual termination of the mandate of a mayor based on a release issued to its citizens...". The President requested this clarification based on the case of resignation of Rahovec Mayor, Mr. Qazim Qeska, through a press release, reconfirmation of such resignation by the Ministry of Local Government, and later on the revocation of this resignation by Mr. Qazim Qeska himself.

The applicant claims that the case at hand contains some unclear issues in relation to the competencies of respective institutions in determining the validity of the resignation and termination of the mandate of a mayor, and as a consequence of these unclear issues he cannot move on with further actions in line with the constitutional principle for free and fair elections. According to him, the President is the authorized party to submit this constitutional matter to the Court, and considering that he is obliged according to the Constitution to ensure compliance with the constitutional principle for free and fair elections, he has to clarify as to what are the further steps that he should undertake following a resignation of a given mayor.

The Constitutional Court decided that the referral is admissible based on the authorisations of the President in the Constitution to raise such Constitutional issues before the Court. Furthermore, the Court decided that based on the Law on Local Self-governance, the resignation of a given mayor is final and definitive and marks the termination of his/her mandate, and that the constitutional consequences of such an action are the announcement of new elections by the President in order to ensure that citizens enjoy the right to free and fair elections when establishing their local self-governance.

Pristina, 7 October 2010
Ref. no. : AGJ 46/10

JUDGMENT

Case No. KO 80/10
The Referral of the President of the Republic of Kosovo, His Excellency, Dr. Fatmir Sejdiu, for Explanations Regarding Jurisdiction over the Case of Rahovec Mayor, Mr. Qazim Qeska

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

The Applicant

1. The Applicant is President of the Republic of Kosovo, His Excellency, Dr. Fatmir Sejdiu.

Legal Basis

2. Articles 84.9 and Article 113.2.1 as well as Articles 123 and 45 of the of the Constitution of the Republic of Kosovo (hereafter referred as "the Constitution").

Procedure before the Constitutional Court

3. On 27 August 2010 the President of the Republic of Kosovo, through his legal representatives submitted the Referral with the Court.

4. On 31 August 2010 pursuant to the Rules of Procedures the President of the Court appointed Dr Gjyljeta Mushkolaj as Judge Rapporteur and a Review Panel consisting of Judges Robert Carolan (Presiding), Altay Suroy and Snezhana Botusharova.

5. On 1 September 2010 the Secretariat of the Court, pursuant to the Rules of the Procedure, notified the Referral to Mr. Qazim Qeska and the Minister of Local Government Administration and requested their responses.

6. On 6 September 2010 the Minister of Local Government Administration submitted his reply to the Referral. Mr. Qeska did not submit a response.

7. Due to the nature of the case on 21 September 2010 the Court gave the priority to the case.

8. On 27 September 2010 the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

9. The full Court delibareted and voted in a private session on the Referral on 27 September 2010.

Subject matter

10. The subject matter is the following question that have been referred to Constitutional Court by the President of the Republic of Kosovo:

    "Which institution in the Republic of Kosovo is responsible for assessing the effectiveness and validity of the resignation and for confirming the eventual expiry of a mayor's term of office, based on communiqué addressed to the public, the uncertainty of which has prevented further actions by the President in compliance with the constitutional principle of free and equal elections?"

Admissibility of the Referral

11. Pursuant to Article 113 (1) of the Constitutional, the Constitutional Court has jurisdiction to decide only on matters refferred to the court in a legal manner by authorized parties.

12. The Applicant argues that present case involves uncertainties regarding the authority of relevant institutions to establish the validity of the resignation and the expiration of a Mayor's term of office based on a statement of resignation addressed to the people of the Municipality. The Applicant further argues that because of these uncertainties, the President could not proceed with further action in compliance with the constitutional principle of free and equal elections, envisaged in Article 123 (2) of the Constitution as far as municipal elections are concerned.

13. The Applicant concludes that since "the President is authorized party according to Article 113, and dispute in question has rendered it impossible for the President to undertake the necessary steps to provide for the abidance by the constitutional principle of free and equal elections, the Court has jurisdiction to consider the present claim filed by the President."

14. Consequently the Applicant argues that requirements specified both in Article 84.9 and Article 113.1.2 of the Constitution are satisfied in the present case.

15. Article 84.9 of the Constitution reads as follows:

"Article 84 [Competencies of the President]

The President of the Republic of Kosovo...

(9) may refer constitutional questions to the Constitutional Court...."

16. It is clear that the pursuant to Article 84(9) of the Constitution, the President of the Republic of Kosovo is authorized to refer constitutional questions to the Constitutional Court.

17. The Court has therefore to consider whether the raised question is "constitutional question" in line with Article 84(9) of the Constitution.

18. For the proper consideration it is necessary to summarize the factual background of the case that caused the question that was put before the Constitutional Court.

Summary of the facts related to the question at issue

19. On 1 July 2010 Mr. Qazim Qeska, Mayor of Rahovec, publicly addressed the citizens of the Municipality of Rahovec, via communiqué, and announced his irrevocable resignation. In his resignation Mr Qeska emphasised that he "made a clear decision, a well thought decision, to untimely end the mandate given...by the people with their free will in conformity with Article 56, item C of the Law on Local Self Government.

20. He also added as follows: *"Dear citizens, this is a painful decision, but I consider deeply in my heart and soul that it is a just and better decision, in the interest of citizens, since the constellation reigning at me, including my health situation, disables me to perform the duties of the mayor with responsibility for the citizens of Rahovec municipality, to whom I committed myself deeply and sincerely. Reasons for my*

resignation and untimely end of the mandate are mainly of personal nature. This decision has been made with the largest determination and responsibility having in mind all facts and personal circumstances (health reasons), as well as the interest of the citizens of Rahovec municipality to whom I was, I am and I will always be correct and I will always be correct and I will not disappoint them. Dear citizens, my mandate belongs to the people-it is yours, so today, on 1 July 2010, I give back to you and only to you the mandate you trusted on me, hoping you will understand me since this decision in the proper and righteous one. My people-the citizens of Rahovec municipality deserve a leader who will always be close to them and with tem, but due to numerous reasons, I am currently not able to stand in front of citizens, as you are accustomed with me. I ask you for your deep understanding of the act of my resignation and untimely end of my mandate."

21. On 6 July 2010 the Minister of the Ministry of Local Government Administration (hereinafter referred to as MLGA), addressed to the Mayor of Rahovec, Mr. Qazim Qeska, with a request for the confirmation of his resignation from the post of Mayor.

22. Mr. Qazim Qeska confirmed his resignation to MLGA and enclosed the written communiqué from 1 July 2010.

23. On 16 July 2010, Minister of the MLGA, sent a letter to the President of the Republic of Kosovo, informing him that Mr. Qazim Qeska had confirmed his irrevocable resignation and that based on Article 56.3, item (c) of the Law on Local Self-Government No. 03/L-040, "the mandate of the mayor of this municipality has ended."

24. It is not the task of the Constitutional Court to evaluate the facts of the particular case, but the above mentioned facts at the outset appear to raise a constitutional question. That it is in particular because it relates to two constitutional provisions, i.e. Article 123 [General Principles of Local Government and Territorial Organization] and Article 45 [Freedom of Election and Participation] of the Constitution.

25. Consequently, based on Article 84.9 of the Constitution, the Court found that the Referral submitted by the President of the Republic on 27 August 2010 is admissible.

26. Taking into account the above-mentioned there is no need for the Court to elaborate admissibility grounds provided by Article 113.1.2. of the Constitution.

Substantive Issue

27. The Court notes that the first part of the question posed by the President, which reads as follows: "*Which institution in the Republic of Kosovo is responsible for assessing the effectiveness and validity of the resignation and for confirming the eventual expiry of a mayor's term of office, based on communiqué addressed to the public…*" queries whether any resignation of any mayor is final and definitive and whether it puts an end to a Mayor's mandate.

28. The General Principles of Local Government and Territorial Organization in the Republic of Kosovo are defined in Article 123 of the Constitution, which reads as follows:

"Article 123 [General Principles]

The right to local self-government is guaranteed and is regulated by law.

Local self-government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections.

The activity of local self-government bodies is based on this Constitution and the laws of the Republic of Kosovo and respects the European Charter of Local Self-Government. The Republic of Kosovo shall observe and implement the European Charter on Local Self Government to the same extent as that required of a signatory state.

Local self-government is based upon the principles of good governance, transparency, efficiency and effectiveness in providing public services having due regard for the specific needs and interests of the Communities not in the majority and their members."

29. The Constitutional Court recalls that Local Authorities are one of the main foundations of any democratic regime. It should be also recalled that in order to fully respect the European Charter on Local Self Government, there is a need to ensure that Local Authorities possess a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised and the resources required for their fulfillment (see Preamble of the European Charter on Local Self Government).

30. The Constitutional right to local self government in the Republic of Kosovo is further regulated by the Law on Local Self Government (Law 2008/03-L040 approved on 20 February 2008 and promulgated on 15 June 2008).

31. Article 56 of the Law on Local Self Government regulates the issue of election of mayor as well as the end of his/her term of office as follows:

"Election of the Mayor of the Municipality

56.1. The Mayor of the Municipality shall be elected by a direct election in accordance with the law on local elections.
56.2. The Mayor of the Municipality shall be elected for a term of four years.

56.3. The term of office of the Mayor of the Municipality shall end upon:

a) the completion of his mandate;

b) his death;

c) his resignation;..."

32. The Court recalls that Article 8 of the European Charter on Local Self-Government regulates the administrative supervision of local authorities' activities. It provides that any review of local authorities' activities shall have a legal basis, and that any administrative supervision shall be restricted to ensuring compliance with domestic law and constitutional principles.

33. The Court notes that, in accordance with the Constitution, and Article 8 of the Charter, the Law on Local Self Government does not empower central level government bodies to carry out any action for acceptance of the resignation of a mayor.

34. Furthermore, in order to answer to the question at issue properly, it should be also recalled that Law on Local Elections in the Republic of Kosovo (2008/03-L072 approved on 5 June 2008 and promulgated on 15 June 2008) in its Article 11 prescribes the end of mandate of mayors as follows:

Article 11

End of mandate and Dismissal of Mayors

11.1 The mandate of the Mayor ends in accordance with the Law on Local Self-Government.

11.2 The Mayor whose mandate ceases pursuant to paragraph 1 of this Article shall be replaced by conducting an early election for a Mayor in that Municipality. The mandate of newly elected Mayor

shall end on the same date as the mandate of Mayor that he or she replaces."

35. In answering the above mentioned constitutional question, taking into account the above mentioned provisions of the Constitution and the applicable laws, the Constitutional Court finds that the resignation of a Mayor is final and definitive and it puts an end of a Mayor's mandate.
36. The Court should also consider what the constitutional consequences are of a Mayor's resignation.

37. The Court recalls that right of self-government can be only exercised by democratically constituted authorities. In this respect it is important to recall that Article 3 (2) of the European Charter on Local Self Government, in the pertinent part reads as follows:

"Article 3 – Concept of local self-government

> 2. *This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them…."*

38. The Court would also like to recall that pursuant to Article 123 (2) of the Constitution the right to local self-government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections.

39. This right should be read in conjunction with Article 45 of the Constitution, that reads as follows:

"Article 45 [Freedom of Election and Participation]

> 1. *Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.*
>
> 2. *The vote is personal, equal, free and secret.*
>
> 3. *State institutions support the possibility of every person to participate in public activities."*

40. The Constitutional Court recalls that the Law on Local Elections gives a power to President of the Republic to set and announce the local elections.

41. Consequently, taking into account Articles 123(2) and 45 of the Constitution in conjunction with Article 3(2) of the European Charter of Local Self Government, the Court finds that constitutional consequences of a mayor's resignation are the calling for elections by the President of the Republic in order to ensure the right of the citizens to enjoy the right to a free and equal vote in establishing their local self-government.

FOR THESE REASONS,

The Constitutional Court, unanimously in its session of 7 October 2010:

DECIDES

I. The Referral is admissible;

II. Any resignation of any mayor is final and definitive and it puts an end of a Mayor's mandate.

III. The constitutional consequences of that act are the calling for elections by the President of the Republic in order to ensure the right of the citizens to enjoy the right to a free and equal vote in establishing their local self-government.

IV. This Judgment shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

V. The Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr. Gjyljeta Mushkolaj, signed	Prof. Dr. Enver Hasani, signed

Ahmet Fetiu vs. Decision A. No. 298/2009 of the Supreme Court of Kosovo

Case KI 54/09, decision of 15 October 2010
Keywords: individual referral, right to fair and impartial trial.

The applicant filed a referral, by which it opposes the judgment of the Supreme Court of Kosovo, which denied him the registration of immoveable property in the register of immoveable property rights. The applicant alleges that such decision denied him the right to a fair and impartial trial.

The Constitutional Court decided to reject applicant's referral, thereby reasoning that the applicant had not proven that the Supreme Court had inaccurately assessed the evidence submitted by the applicant.

Pristina, 15 October 2010
Ref. No.: RK 54 /10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 54/09
Ahmet Fetiu
vs.
Decision A. No. 298/2009 of the Supreme Court of Kosovo, dated 11.09.2009

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

Applicant

1. The Applicant is Mr. Ahmet Fetiu, from the Municipality of Gjakova.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo, A. no. 298/2009, dated 11 September 2009, which was served on the Applicant on 19 September 2009.

Subject matter

3. On 15 October 2009, the Applicant filed a referral with the Constitutional Court, , challenging the judgment of the Supreme Court A. no. 298/2009. The Applicant claims that the judgment in question denied him the registration of the ownership of cadastral plot No. 1798, Cadastral Zone in Gjakova,, in the Immovable Property Rights Register.

Legal basis

4. Article 113 (7) of the Constitution of the Republic of Kosovo (hereinafter referred to as: the "Constitution"), Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the "Law"), and Section 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the "Rules").

Summary of the proceedings before the Court

5. The referral was filed with the Constitutional Court on 15 October 2009.

6. On 16 July 2010, after having considered the Report of the Judge Rapporteur, Dr. Gjyljeta Mushkolaj, the Review Panel, composed of the Judges Altay Suroy (Presiding), Prof. Dr Ivan Čukalović, and Prof. Dr. Iliriana Islami made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of facts

7. The Applicant claims that the cadastral plot No. 1798, Cadastral Zone of Gjakova-town, is the property of his family.

8. The property in question, according to the Municipality of Gjakova, was expropriated on 20 August 1960, based its Decision 03-4242/60. Nonetheless, the transfer of ownership was not registered in the Municipal Cadastral Office in Gjakova until 16 December 1998 (Decision 952-01-275/98).

9. The Applicant challenged Decision 952-01-275/98 at the Geodetic Authority in Belgrade. On 24 December 1998, the said Authority issued

Decision No. 03-952 – 1290/98, annulling Decision 952-01-275/98 of the Municipal Cadastral Office in Gjakova. Nonetheless, the Municipal Cadastral Office in Gjakova apparently never transferred the land into applicant's ownership, but, instead, constructed a parking lot and other facilities on that land.

10. On 22 September 2008, the Applicant complained to the Municipal Cadastral Office in Gjakova that the decision of the Geodetic Authority in Belgrade was never executed. He, therefore, requested the Municipal Cadastral Office to register the land in his name. However, the Municipal Cadastral Office refused his request on 22 September 2008 (No. 952-1290/98), stressing that, based on Article 56 (1) on the Law on Administrative Procedure, the interested party bears the burden of proof. Therefore, considering that the applicant had not offered complete evidence to support his request (only a photocopy of the decision of the Geodetic Authority in Belgrade, instead of the original), his request was rejected as ungrounded.

11. The Applicant filed an appeal against Decision No. 952-1290/98 of the Municipal Cadastral Office with the Supreme Court, which, by Judgment A. No. 298/2009 of 11 September 2009, ruled that it concurred with the reasoning of the Municipal Cadastral Office of Gjakova, and added that Article 3(2) of Law 2002/5 on the Establishment of the Immovable Property Rights Register is based on the same conclusion. The Supreme Court also explained that the transfer of ownership was complete and valid, pursuant to Decision on expropriation No. 03-4242/60, dated 20 August 1960. The Supreme Court emphasized that the registration of land as municipal property in 1998 was only a technical issue and that the decision on land restitution would conflict with the original decision on expropriation rather than the efforts to register the property in 1998. According to the Supreme Court, ownership was not a contested issue.

Applicant's allegations

12. The Applicant claims that the decision of the Supreme Court violated Article 31 of the Constitution and Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

Assessment of the admissibility of the Referral

13. In order to be able to adjudicate the Applicant's Referral, the Court needs first to assess if the Applicant has fulfilled the admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure.

14. As to the present case, the Applicant should have submitted sufficient evidence, showing that the assessment of evidence by the Supreme Court was clearly inaccurate, constituting a failure by the Supreme Court to guarantee to the Applicant a fair trial, pursuant to Article 31 of the Constitution.

15. However,, it is not the task of the Constitutional Court to assess the legality and accurateness of decisions made by competent judicial institutions, unless there is evidence that such decisions have been rendered in an obviously unfair and inaccurate manner.

16. The Constitutional Court's task with regard to alleged violations of constitutional rights is to examine whether the proceedings, taken as a whole, were fair and complied with the specific safeguards stipulated by the Constitution. The Constitutional Court is, therefore, not a fourth instance of appeal, and has no jurisdiction to reopen court proceedings or to substitute decisions of regular courts with its own findings.

17. There is no evidence in the instant case that the Supreme Court has assessed the evidence provided by the Applicant in an inaccurate manner. In fact,the Applicant has failed to prove that the Supreme Court has violated Article 6 of the European Convention on Human Rights and Article 31 of the Constitution. The Applicant has also failed to submit the necessary evidence that would prove that the Supreme Court and the Kosovo Cadastral Agency have violated basic human rights guaranteed by the Constitution

18. For these reasons, the Court finds that the Applicant's Referral is manifestly ill-founded, and, therefore, rejects it as inadmissible (*see Resolution on Inadmissibility Case No. KI 13/09, Sevdail AVDYLI Against Supreme Court Judgment A. No. 533/2006 of 11 September 2006 and Supreme Court Judgment A. No. 353/2003 of 2 December 2003, dated 17 June 2010*).

FOR THESE REASONS

The Court, pursuant to Article 113 (7) of the Constitution, Article 20 of the Law, and Article 55 of the Rules of Procedure, unanimously, in its session of 15 October 2010:

DECIDES

I.TO REJECT the referral as Inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr. Gjyljeta Mushkolaj, signed	Prof. Dr. Enver Hasani, signed

Muhamet Bucaliu vs. the decision of the State prosecutor KMLC. No. 09/10

Case KI 20/10, decision of 15 October 2010
Keywords: individual referral, interim measures, right to property, equality before the law, the right to a fair and impartial trial, the right to legal remedies.

The applicant filed a referral whereby he claims that the Municipal Court in Ferizaj did not take a decision in relation to the law suit within the deadline and that he did not receive the execution decision. He states that by acting in such a manner the right to a fair and impartial trial, the right to legal remedies and judicial protection of his rights were violated. At the same time, the applicant requested granting interim measures in order to suspend the executive procedure in relation to his property in order to avoid any risk for irrecoverable damage.

The Constitutional Court decided to reject applicant referral as inadmissible with a reasoning that the applicant failed to prove that he has exhausted all legal remedies foreseen by the law. Furthermore, the Constitutional Court decided to reject applicant's referral for interim measures with reasoning that he did not present any convincing evidence in support of the argument that he will suffer irrecoverable damages should his request for interim measure be denied.

Pristina, 15 October 2010
Ref. No.: RK50/10

RESOLUTION ON INADMISSIBILITY
in
Case No.KI 20/10
Muhamet Bucaliu
vs.
Decision KMLC.no. 09/10 of the 24 February 2010 of the State Prosecutor

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

Applicant

1. The Applicant is Mr. Muhamet Bucaliu, residing in Ferizaj.

Challenged Decision

2. The Applicant challenges Decision KMLC.No. 09/10 of the State Prosecutor date 24 February 2010

Subject Matter

3. The Applicant complains that he has not received the execution decision of the Municipal Court of Ferizaj date 11 January 2008 and that the same court has not decided the case within the limits of the claim, when evaluating the value of the property.

4. He alleges, that Article 24 (1) [Equality before the Law], Article 21 (1) [Right to Fair and Impartial Trial] Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution have been violated.

5. The Applicant also requests the Court to decide on his request for interim measures against the execution procedure in respect to his property in order to avoid any risk of irreparable damage.

Legal Basis

6. Article 113(7) of the Constitution of the Republic of Kosovo (hereinafter referred to as: The Constitution), Article 22(7) and (8) and Article 27 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter referred to as: the Law) and Sections 51, 53 and 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 4 March 2010, the Applicant filed a referral with the Court challenging Decision KMLC.No. 09/10 of the State Prosecutor, dated 24 February 2010, and submitted to the Court a request for interim measures.

8. On 13 July 2010, the Review Panel, consisting of Judges Ivan Čukalovič (Presiding), Enver Hasani and Iliriana Islami, considered the report of the Judge Rapporteur Snezhana Botusharova and made a recommendation to the Court on both the Applicant's request for interim measures and the inadmissibility of the Referral.

Summary of the facts

9. From the documents submitted by the Applicant it appears that, on 14 June 2005, he entered into a mortgage agreement (Agreement No. 11715/H) with the Raiffeisen Bank, whereby he deposited his immovable property (Cadastral Plot No.1071 in Ferizaj) as a pledge for a credit given to the debtor "Nera Impex" in Ferizaj.

10. On 10 January 2008, the Raiffeisen Bank submitted a request to the Municipal Court of Ferizaj for the execution of the sale of the Applicant's property after the debtor had failed to honor the mortgage agreement.

11. On 10 January 2008, the Raiffeisen Bank submitted a request to the Municipal Court of Ferizaj for the execution of the sale of the Applicant's property after the debtor had failed to honour the mortgage agreement.

12. By Decision E.No. 04/2008 of 11 January 2008, the Municipal Court approved the request for execution of the Raiffeisen Bank.

13. On 20 October 2009, the Municipal Court of Ferizaj (Decision E.No. 04/2008 of 20 October 2009), without holding a hearing, decided on the value of the immovable property, it being a total amount of 1.096.500 Euro in accordance with the market value. This estimation was done by a financial expert in March 2008. The Court also decided on the conclusion of the public sale of the real estate and the assets pledged which was set for 15 February 2010.

14. The Applicant appealed the decision of the Municipal Court of Ferizaj to the District Court of Pristina, arguing that the court had assessed the factual situation in a wrongful manner.

15. On 11 November 2009, the District Court of Pristina (Decision Ac.No. 1292/2009 of 11 November 2009) rejected the Applicant's claim as unfounded and upheld the decision of the Municipal Court of Ferizaj to allow the execution. The District Court concluded that the assessment of the factual situation was accurate and done in accordance with applicable law.

16. On February 2010, the Applicant submitted a claim to the Municipal Court of Ferizaj requesting the annulment of its Decision E.No. 04/08 of 11 January 2008.

17. On the same date, the Applicant submitted a claim for protection of legality to the State Prosecutor against the decisions of the Municipal Court of Ferizaj and of the District Court of Pristina. The State Prosecutor found that there was no legal basis for the claim and concluded that the Applicant as a guarantor of the debtor Nera Impex and the debtor itself were at the hearing of the Municipal Court of Ferizaj on 22 September 2009 and none of them had submitted an objection against the execution, except for a claim against the estimation of the value of the property.

The Applicant's allegations

18. The Applicant alleges that he has not received the decision on execution of the Municipal Court of Ferizaj of 11 January 2008 and that, therefore, the Municipal Court has violated Article 47(1) and (2) of the Law on Execution Procedure.

19. The Applicant further alleges that the Municipal Court, in Decision E.No. 04/2008 of 20 October 2009, did not rule within the limits of the claim, since it had determined the execution of the entire property, instead of the property mentioned in the possessions list No. 1071. In his opinion, the Municipal Court, therefore, violated Articles 49 and 22 of the Law on Execution Procedure and Article 22 of the Law on Contested Procedure.

20. The Applicant claims a violation of Article 24(1) [Equality before the Law], Article 31(1) [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution.

Assessment of the request for interim measures

21. In light of the facts provided by the Applicant, the Court finds that the Applicant has failed to establish that there exists a prima facie case for the Court to decide on his request for interim measures, as required by Article 27 of the Law.

22. The Court, therefore, concludes that the request for interim measures is unsubstanciated, the Applicant not having submitted any convincing arguments that he might sustain irreparable damage, if his request for interim measures would not be granted.

Assessment of the admissibility of the Referral

23. However, as to the requirement that the Applicant must show that he has exhausted all legal remedies as provided by law, the Court notes that the Applicant could have complained to the Municipal Court of Ferizaj and the District Court of Pristina that he had not received Decision E.No. 04/08 of 11 January 2008 of the Municipal Court of Ferizaj and that the same Court, in its execution decision, had gone outside the limitations of the claim. Instead the Applicant only submitted a claim against the evaluation of the value of the property.

24. It follows, that the Applicant has not established that he has exhausted all legal remedies available under applicable law.

25. The Court, therefore, concludes that the Referral is inadmissible.

FOR THESE REASONS

26. The Constitutional Court, pursuant to Articles 27 and 47 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously, in its session of 15 October 2010:

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	**President of the Constitutional Court**
Snezhana Botusharova, signed	Prof. Dr. Enver Hasani, signed

Heirs of Ymer Loxha and Sahit Loxha vs. the decision Pkl. No. 21107/08 of the Supreme Court

Case KI 14/09, decision of 15 October 2010
Keywords: Individual referral, confiscation of property, right to fair and impartial trial, right to effective legal remedy.

Applicants filed a referral against the decision of the Supreme Court, which had rejected the request for protection of legality filed by the applicants against the District Court in Peja in 1945, thereby rejecting the reopening of criminal proceedings according to which brothers Ymer Loxha and Sehit Loxha were proclaimed enemies of the people and were confiscated their property. Applicants allege that their right to a fair and impartial trial, and right to effective legal remedies, were violated, alleging that the Supreme Court had not interpreted the law properly. At the same time, applicants claimed that the case tried by the District Court in Peja in 1945 was a criminal case, where the measure of property confiscation, according to the Law on Criminal Offences against the People and State, was only pronounced against convicted persons, and not against persons that were proclaimed enemies of the people.

The Constitutional Court decided to reject applicants' referral as inadmissible, thereby reasoning that it is time-barred and it is not in compliance with provisions of Constitution. The Court found that in review of the case, it did not find any indication that previous proceedings of this case were unfair or blemished with arbitrariness. Further, in terms of restitution of confiscated property, the Court found that the Kosovo Assembly is the responsible body to approve a Law on Property Restitution, as per recommendations of the Comprehensive Status Proposal for Kosovo, Annex VII, Article 6 (1) and Article 143 of the Constitution, in connection to Article 2 (13) of the Annex XII (Legislative agenda). Considering that such a law has not been adopted yet, the Court reminds the authorities of the Republic of Kosovo of their obligation to decide upon an "independent mechanism to formulate the political, legal and institutional framework to address issues of property restitution".

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.21107 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 Čukalovič, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicants

1. Based on the submissions, the Applicants

(1) Xhafer Loxha,
(2) Nezije Koro,
(3) Behide Eishani,
(4) Myzafere Gacaferri,
(5) Nexhdet Loxha,
(6) Zebra Broqi,
(7) Besim Kardesh,
(8) Belkize Gjogoviqi,
(9) Atifete Loxha,
(10) Agim Loxha,
(11) Nexhmedin Loxha,
(12) Behixhe Loxha,
(13) Aferdita Yokshi,
(14) Xhavit Loxha,
(15) Nekibe Jadrashi,
(16) Nemide Hadri,
(17) Resmije Peja and
(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 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 PCPCK[2] .

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,

[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.

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.

14. At its session held on 17 December 2008, the Supreme Court, by Judgment Pkl.Nr.21107, 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 posses 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 instruments[3], 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 interprete 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 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

[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.

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, including those related to the Serbian Orthodox Church, 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, including those related to the Serbian Orthodox Church, 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 Period[4]) 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".

[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".

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.”

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law and Section 54(b) of the Rules of Procedure, unanimously, in its session of 15 October 2010:

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	**President of the Constitutional Court**
Dr. Gjyljeta Mushkolaj, signed	Prof. Dr. Enver Hasani, signed

Vesel Tmava et al. vs. Decision 303/09 of the Ministry of Transport and Post-Telecommunications of the Republic of Kosovo

Case KI 17/10, decision of 15 October 2010
Keywords: individual referral, interim measure, property rights, equality before law, supremacy of constitution, retroactive application of administrative decisions.

Applicants filed a referral against the decision of the Ministry of Transport and Post-Telecommunications, which provides that all persons who are owners of vehicles designated for markets of Great Britain, Cyprus or Malta, shall “obtain a certificate of compliance by an authorized institution in the Republic of Kosovo”. Applicants allege that the law does not provide retroactive application of this decision. In this regard, they claim that such a decision deprives them from exercising the right to property, thereby violating equality before law and supremacy of the Constitution. Simultaneously, the applicants have requested the Court to grant interim measure, thereby suspending retroactive application of the decision, until the Court takes a merit-based decision on this case.

The Constitutional Court decided to reject the referral as inadmissible, reasoning that applicants have not exhausted all legal remedies available. Further, the Court decided that the request for interim measures is unfounded, and as such is rejected as inadmissible, thereby reasoning that the applicants do not specify reasons for such interim measure, nor do they specify consequences which may arise if such a measure is not granted.

Pristina, 15 October 2010
Ref. No.: RK48/10

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 Čukalovič 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

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)

[1] Introduction of the Administrative Instruction No. 2008/08.
[2] Decision No. 303/09, paragraph 4.
[3] Ibid. at paragraph 5.

[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

[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.

granted. Thus, the arguments 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,

[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

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.

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, in its session of 15 October 2010:

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.

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

IV.This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues, signed	Prof. Dr. Enver Hasani, signed

Reshat Karanxha vs. the Kosovo Judicial Council

Case KI 18/09, decision of 15 October 2010
Keywords: individual referral, right to work and exercise profession, judicial protection of rights, equality before law, right to life, community rights, appointment and dismissal of judges, responsibilities of the state, right to access official documents.

The applicant filed a referral alleging that his constitutional rights, especially the right to work and exercise profession, were violated by the Kosovo Judicial Council, which withdrew the recommendation the applicant had submitted to the SRSG, despite the fact that such a recommendation was approved by the Kosovo Assembly. According to case files, the KJC had withdrawn this recommendation after investigating the criminal past and ethnicity that applicant had stated when applying for the position of a Judge in the Minor Offence Court in Prizren.

The Constitutional Court decided to reject applicant referral as inadmissible, thereby reasoning that the KJC actions, which according to the applicant resulted in a violation of his rights, are actions that took place before the Constitution entered into force. Consequently, the Court found this referral to be time-barred and in contradiction in *"ratione temporis"* with provisions of the Constitution and the law.

Pristina, 15 October 2010
Ref. No.: RK 49/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 18/09
Reshat Karanxha
vs.
Kosovo Judicial Council

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
Ivan Cukalovi, Judge
Snezhana Botusharova, Judge

Gjyljeta Mushkolaj, Judge and
lliriana Islami, Judge

Applicant

1. The Applicant is Mr. Reshat Karanxha, residing in Prizren.

Opposing Party

2. The Opposing Party is the Kosovo Judicial Council of the Republic of Kosovo (hereinafter: the "KJC").

Subject Matter

3. On 3 June 2009, the Applicant filed a Referral with the Secretariat of the Constitutional Court (hereinafter: the "Court"), alleging that his fundamental human rights protected by the Constitution, in particular, Article 49, his right to work, has been violated by the KJC and the Special Representative of the Secretary General of the United Nations (hereinafter: the "SRSG"), since the KJC had withdrawn its recommendation to the SRSG to appoint him as a Minor Offences Judge in the Municipal Court in Prizren, although the Assembly of Kosovo had already approved the KJC's recommendation for his appointment on 21 September 2006.

Legal basis

4. Article 113 (7) of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"); Article 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. On 3 June 2009, the Applicant filed a Referral with the Secretariat of the Court.

6. By letter of 27 May 2010, the Applicant was asked by the Judge Rapporteur, assigned to the case, whether he had taken any steps to correct the record of his criminal conviction. In reply, the Applicant stated that the Municipal Court in Prizren did not have any record of his 1986 conviction. In the Applicant's opinion, there is, therefore, no court record to correct.

7. The KJC, to which the Referral was communicated, did not submit its comments to the Referral.

8. Although asked by the Judge Rapporteur, the Municipal Court in Prizren did not verify whether there still was a court record of the Applicant's conviction of 15 January 1986 (Judgment 317/85).

9. The Applicant, however, submitted evidence from the Ministry of Justice, Republic of Croatia, dated 25 January 2008, certifying that he had not been convicted. He further submitted a communication from the Ministry of Justice of the Republic of Serbia (Ministry of Internal Affairs, Police Administration Prizren 09 No.235-304/06, issued on 17.10.2006, IKM Krusevac) certifying that he had not been convicted. In addition thereto, the Municipal Court of Ferizaj issued a statement on 26 March 2009 certifying that the Applicant had not been convicted for a criminal act resulting in three (3) years of imprisonment or a fine.

10. . On 14 June 2010, after having considered the Report of the Judge Rapporteur Robert Carolan, the Review Panel, composed of Judges Snezhana Botusharova (Presiding), Altay Surroy and Ivan Čukalovič, made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

11. In June 2006, the KCJ recommended to the SRSG to appoint 22 persons, who had successfully completed the International Leadership Program (ILEP), as judges. The Applicant was one of those persons.

12. On 21 September 2006, the Assembly of Kosovo initially approved the Applicant's appointment to the position of Minor Offences Judge in the Municipal Court in Prizren, subject to final confirmation by the SRSG. Pursuant to Section 1(5) of UNMIK Regulation No. 2005/52 on the Establishment of the Kosovo Judicial Council (hereinafter: "Regulation 2005/52"), the SRSG shall exercise final authority regarding the appointment and removal of judges from office.

13. In October 2006, the KJC was informed that the Applicant had been convicted of some criminal acts. It, therefore, requested the SRSG to postpone the appointment decision of the Applicant until further notice, since this information needed some investigation.

14. The information was that, between 1986 and 2002, the Applicant had been convicted in four separate cases. Three of the convictions had been expunged from his record, but the fourth one, a conviction of 15 January

1986 for use of violence in violation of Article 195 (1) of the Criminal Code of the Socialist Autonomous Province of Kosovo (Judgment K. 317/85), carrying a period of imprisonment of two months, had not been expunged.

15. In addition to this conviction, the Municipal Court in Zagreb, Croatia, by judgment of 15 October 1986, had, allegedly, convicted the Applicant to a fine of 50.000 dinars for a criminal act in violation of Article 163(1) and (3) of the Criminal Code of Croatia (K 537/85).

16. It further appears that the Municipal Court of Ferizaj convicted him in 2001 for the infliction of light bodily harm (Judgment P. No. 357/2001) and sentenced him to two (2) months imprisonment.

17. In his application for the position of judge in the Minor Offences Court in Prizren, the Applicant stated that he had not been convicted of a crime and that he was of Turkish origin.

18. In October 2006, a verification officer of the UNMIK Department of Justice went to the Municipality of Prizren to check the birth records of the Applicant and learned that his parents were of Albanian origin. Therefore, it was determined that the Applicant was of Albanian and not Turkish descent.

19. By letter of 24 March 2007, the KJC informed the Applicant, that, as he had been convicted on four separate occasions between 1986 and 2002 and as one of those convictions dated 15 January 1986 had not been expunged, it withdrew its preliminary recommendation for the Applicant's appointment as a judge in the Minor Offences Court in Prizren.

20. It also appears from the documents, that there was some confusion with respect to the Applicant's criminal record which seems to have been created in part by an error in the translation of one of the documents. Namely, before the Assembly of Kosovo preliminarily approved the Applicant's appointment as a judge, the original investigation report, drawn up in English, mentioned the prior criminal convictions. However, when this report was translated into Albanian and Serbian, it was erroneously stated that the Applicant had not been convicted.

Applicant's allegations

21. The Applicant alleges a violation of the following constitutional rights:

- Article 22 (1), (2) and (4) [Chapter II, Fundamental Rights and Freedoms, Direct Applicability of International Agreements and Instruments];

- Article 24 (1) and (2) - [Equality Before the Law]

- Article 25 (1) - [Right to Life]

- Article 41 (1) and (2) - [Right of Access to Public Documents]

- Article 49 (1) and (2) - [Right to Work and Exercise Profession]

- Article 54 - [Judicial Protection of Rights]

- Article 57 (1), (2) and (3) - [Chapter III, Rights of Communities and Their Members, General Principles]

- Article 58 (2) - [Responsibilities of the State]

- Article 61 - [Representation in Public Institutions Employment]

- Article 104 (5) - [Appointment and Removal of Judges]

- Article 108 (3), (4) and (5) - [Chapter VII, Justice System, Kosovo Judicial Council]

22. The Applicant further complains that the KJC acted contrary to Articles 22 (2) and (4), 49 and 54 (1) of the Constitution, by not appointing him as a judge in the Minor Offences Court in Prizren, although the Kosovo Assembly had already approved the KJC's recommendation for his appointment on 21 September 2006.

23. In addition to the alleged violation of his constitutional rights, the Applicant alleges a violation of the following laws in connection with the violation of his constitutional rights:

- Articles 9(2), 35(3), 37(1) and (2) and 77 of Law (No. 02/L-28) on Administrative Procedure;

- Article 1(a)(i) of Law (No. 2003/12) on Access to Official Documents; and

- Articles 2 (a), 4 (a) and (j) of the Anti-Discrimination Law (No.2004/3).

Assessment of admissibility of the Referral

24. In order to be able to adjudicate the Applicants' Referral, the Court need first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution that are further specified in the Law on the Constitutional Court and the Rules of Procedure.

25. As to the present Referral, the Court notes that the actions of the KJC, which, according to the Applicant, violated his constitutional rights, occurred in March 2007. This means that the Referral relates to events prior to 15 June 2008 that is the date of the entry into force of the Constitution.. It follows that the Referral is out of time and, therefore, incompatible "ratione temporis" with the provisions of the Constitution and the Law (*see Resolution on Inadmissibility, Case KI 25/09 Shefqet Haxhiu vs. Workers Organisation "Industria e akumulatoreve" of 21 June 2010* and *Blecic v. Croatia, Application no. 59532/00, ECHR Judgment of 29 July 2004*).

26. Accordingly, the Applicants' Referral must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously, in its session of 15 October 2010:

DECIDES

I. TO REJECT the referral as Inadmissible.

II. 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.

III. The Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan, signed	Prof. Dr. Enver Hasani, signed

IIaz Cerkinaj

Case KI 28/09, decision of 15 October 2010
Keywords: individual referral, abstract control of constitutionality, *locus standi*

The applicant requested from the Court to interpret Article 111 of the Constitution according to which the Kosovo Agency for Registration Businesses, which is part of Ministry of Trade and Industry, issues licenses to lawyers and their businesses. He claims that by acting in such a way some lawyers who lost the license for exercising this profession, are enabled to register as regular businesses and continue their work without the necessary license.

The Constitutional Court decided to reject applicant's referral as inadmissible with reasoning that applicant's referral lacks what is called *locus standi* before this court. The applicant requested for an abstract control of constitutionality, because he did not prove that a public authority has violated any of his individual rights of freedoms guaranteed by the Constitution as required by Article 113.7 thereof.

Pristina, 15 October 2010
Ref. No.: RK 52/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 28/09
Ilaz Çerkinaj

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

Applicant

1. The Applicant is Mr. Ilaz Çerkinaj, a practising lawyer in Pristina.

Subject Matter

2. The Applicant requests the Constitutional Court (hereinafter: the "Court") to interpret Article 111 [Advocacy] of the Constitution of the Republic of Kosovo.

Legal Basis

3. Article 113 (7) of the Constitution, Article 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

4. On 10 December 2009, the Applicant submitted the Referral to the Court.

5. On 8 April 2010, the Review Panel, consisting of the Judges Ivan Čukalovič (Presiding), Almiro Rodrigues and Gjyljeta Mushkolaj, considered the Report of Judge Rapporteur Iliriana Islami and made a recommendation to the full Court on the inadmissibility of the Referral.

Allegations of the Applicant

6. The Applicant requests the Court to interpret Article 111 of the Constitution, alleging that the Kosovo Business Registration Agency, which is part of the Ministry of Economy and Trade of the Republic of Kosovo, registers businesses of attorneys who are not registered with the Chamber of Advocates.

7. According to the Applicant, this opportunity is used by those who are prohibited to practise law because of poor professional behavior. They register instead as a business to continue the profession.

Assessment of the admissibility of the Referral

8. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

9. From the submitted documents it appears that the Applicant does not have *locus standi* before this Court because he has not substantiated that

a public authority has violated any of his individual rights and freedoms guaranteed by the Constitution, as required by Article 113 (7).

10. The Applicant simply requests an interpretation of Article 111 of the Constitution.

11. In these circumstances, the Court concludes that the Referral must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 48 of the Law and Section 54 (b) of the Rules of Procedure, unanimously, in its session of 15 October 2010:

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr. Iliriana Islami, signed	Prof. Dr. Enver Hasani, signed

Radio Zëri i Sharrit vs. Decision A. No. 2194/07 of the Supreme Court of Kosovo

Case KI 38/09, decision of 15 October 2010
Keywords: Individual referral, constitutionality, right to inform and be informed, freedom of expression, right to work and exercise profession, right to develop and promote

The applicant filed a referral requesting assessment of constitutionality of the decision of the Supreme Court, which had found inadmissible his appeal against the Judgment of the Municipal Court in Kacanik. In both instances, the applicant had requested restitution of radio-broadcasting equipment confiscated by the Independent Media Commission due to violation of license terms, and both courts had rejected such requests. He alleges that the decision of the Supreme Court of Kosovo presents a violation of fundamental rights and freedoms, human rights, right to be informed, freedom of expression, right to work and exercise profession, and the right to develop and promote.

The Constitutional Court decided to reject the referral as inadmissible, thereby reasoning that the applicant filed his referral after the deadline of four months from the delivery of judgment, as provided by the Law on the Constitutional Court.

Pristina, 15 October 2010
Ref. No.: RK 53 /10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 38/09
Radio Zëri i Sharrit
vs.
Decision A.no. 2194/07 of the Supreme Court of Kosovo, dated 12 February 2009

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

Applicant

1. The Applicant is a resident of the Republic of Kosovo.

Challenged Decision

2. The Applicant challenges decision A.no.2194/07 of 12 February 2009 of the Supreme Court of Kosovo, received by the Applicant on 20 April 2009.

Subject Matter

3. The Applicant alleges that the decision of the Supreme Court is in violation of fundamental rights and freedoms protected by the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"): "human rights, the right to inform and be promptly informed, freedom of expression, the right to work and exercise professsion, development and enhancement."[1]

4. He further alleges that the Supreme Court...does not respond to him regarding his lawsuit, thereby making him feel "insulted, surprised and disappointed with this clear injustice committed by the judges of this institution."

Legal Basis

5. Article 113 (7) of the Constitution; Articles 47 (2), 48, and 49 of Law (No. 03/L-121) on the Constitutional Court of the Republic of Kosovo of 16 December 2008, , (hereinafter: "the Law"); and Sections 54 (b) and 69 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: "the Rules of Procedure").

Proceedings before the Court

6. On 15 September 2009, the Applicant submitted the Referral to the Court, requesting it to evaluate the constitutionality of the Supreme Court Decision A. nr. 2194/07.

7. On 14 April 2010, the Review Panel, consisting of Judges Kadri Kryeziu (Presiding), Enver Hasani and Iliriana Islami, considered the Report of

[1] The Applicant does not specify which Articles of the Constitution have been violated.

the Judge Rapporteur Gjyljeta Mushkolaj and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

8. On 19 December 2000, the Independent Media Commission (hereinafter: the "IMC") issued to the Applicant a license to transmit and operate in the Municipalities of Kacanik and Ferizaj.

9. On 21 July 2005, the IMC and the Applicant agreed upon new terms regarding the functioning and the operation of the radio transmissions, modifying the license that was issued on 19 December 2000.

10. The Applicant began transmitting in the region that was determined in the license of 2005, but moved temporarily to another location, since he had problems with the location where he transmitted from. In particular, on 11 June 2005, the Applicant experienced severe and uncontrollable circumstances of force majeure. As a result, the Applicant moved temporarily to another location, which was outside the region determined in the license. According to the Applicant, the IMC was notified.

11. At the beginning of November 2006, it was brought to IMC's attention that the Applicant changed the location of the transmitter, thereby no longer transmitting from the location as obliged by the modified license of 2005. In particular, on 6 November 2006, the Frequency Management Division (hereinafter "the FMD") of the IMC noticed that the Applicant was transmitting from another location.

12. Furthermore, the FMD noticed that the geographic coordinates of the Applicant were significantly different from those specified in the license of 2005. Rather than complying with the frequency coordinates assigned in the license, the FMD established that the Applicant was using different frequency coordinates.

13. On 7 November 2006, after having identified these irregularities, the FMD sent a letter to the Applicant to clarify the change of location and of frequencies.

14. On 9 November 2006, the Applicant replied to the FMD stating that the Radio changed its location due to force majeure. and that the same area was covered in accordance with the license.

15. On 13 November 2006, the IMC sent a letter to the Applicant informing him that, regardless of the reasons provided by him, the Applicant's

decision to change the location without a prior written request to IMC did not comply with the license of 2005. Furthermore, the IMC had required from the Applicant to relocate to Hani Elezit within five (5) days.

16. On 10 January 2007, the IMC sent a notification to the Applicant regarding the violation of the license of 2005.

17. On 2 March 2007, after a disagreement between the IMC and the Applicant regarding the change of location of the Radio, the IMC offered to sign an agreement that would satisfy both parties. The Applicant rejected such agreement.

18. As a result, the IMC concluded that the License had been violated, and decided to impose sanctions upon the Applicant. In addition, the Applicant was ordered to relocate the antennas and operate from the location as indicated in the license of 2005.

19. Since the Applicant did not agree with the sanctions imposed by the Media Appeals Board of the IMC, the latter confiscated the radio transmitter equipment from the Applicant on 5 June 2008.

20. On 3 July 2008, the Applicant filed a law suit against the IMC in the Municipal Court of Kacanik (C. Nr. 112/08), requesting the court to annul the decision of the IMC and to return radio transmitter equipments. However, the court rejected the Applicant's claim.

21. Thereupon the Applicant filed an appeal with the Supreme Court. On 12 February 2009, the Supreme Court decided that the law suit filed against the IMC and against the decision of the Media Appeals Board nr. 0707/0750/MAB/wb was inadmissible. The Supreme Court assessed that the procedures followed prior to the IMC's decision were in accordance with the rules of administrative procedure, that the facts were proven to be correct, and that the material law was correctly applied.

22. On 25 June 2009, the Assembly of Kosovo discussed and voted upon the IMC's 2008 annual report. The issue regarding the closing of the Radio was also discussed and brought up by several Assembly members. Considering the maintenance of the independent nature of the IMC, however, the Assembly determined that it could debate such issues and assess the situation only after the IMC itself had compiled a report with recommendations.

23. On 15 September 2009, the Applicant submitted the referral to the Court, arguing that Supreme Court decision A. nr. 2194/07 violated the following rights and freedoms guaranteed and protected by the Constitution: "human rights; the right to inform and be promptly informed; freedom of expression; the right to work and exercise a professsion; right to development and enhancement." The Applicant, however, does not specify which articles of the Constitution have been violated.

Applicant's allegations

24. The Applicant alleges that his Radio acted in accordance with the License of 2005and that, in particular, Section 20 of the License of 2005, Altitude of Antenna Site, allowed him to erect the antennas up to 1100 m. According to the Applicant, the Radio's antennas were even at a lower altitude than the license allowed and, therefore, the IMC's decision to confiscate the transmitter equipment and interrupt the broadcasting violated the license as well as the applicable laws. He further alleges that, indeed, the IMC, in its decision dated 6 April 2007, pointed out that the altitude of the antenna's was mistakenly assigned, in particular, because such altitude would not be realistically granted anyway due to the fact that such it cannot even be found in Hani i Elezit and that the license explicitly defined the geographic coordinates of operation, only covering the territory of Hani i Elezit.

25. The Applicant further claims that he was harmed by the decision of the IMC and, as a result, asks for material compensation of 90,000.00 EUR (ninety-thousand Euros).

Assessment of the admissibility of the Referral

26. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

27. In this connection, the Court refers to Article 49 (Deadlines) of the Law, stipulating 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. ..

28. As to the present Referral, the Court notes, that the final decision of the Supreme Court of Kosovo, dated 12 February 2009, was served on the Applicant on 20 April 2009, whereas he only filed the Referral with the Court on 15 September 2009. It follows that the Referral has not been filed with the Court within the time limit, stipulated by Article 49 of the Law.

27. Accordingly, the Referral must be rejected as inadmissible

FOR THESE REASONS

The Constitutional Court, pursuant to Article 49 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously, in its session of 15 October 2010:

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr. Gjyljeta Mushkolaj, signed	Prof. Dr. Enver Hasani, signed

Halil Karafeta vs. the Supreme Court of Kosovo Decision No. 262/2009

Case KI 42/09, decision of 18 October 2010
Keywords: individual referral, the right to work, judicial protection of rights

The applicant filed a referral against a Decision of the Supreme Court of Kosovo, which decided that Kosovo Railways did not violate the applicable law when it terminated the applicant‘s employment contract and when it employed several other employees which met the criteria. The applicant claimed that the respective judgment is based on an erroneous interpretation of applicable laws, by adding that his right to work has been violated as a result.

The Constitutional Court decided to reject applicant's referral as inadmissible with reasoning that claims of the applicant were unfounded. Following the examination of all procedures, the Court did not find that procedures were in any way unfair or arbitrary and that the applicant did not present any evidence that would indicate other violations of his constitutional rights.

Pristina,18 October 2010
Ref.No.:RK 60/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 42/09
Halil Karafeta
vs.
Decision of the Supreme Court of Kosovo,
No. 262/2009, dated 26 June 2009

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 Čukalovič, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant:

1. The Applicant is Halil Karafeta from the Municipality of Pristina

Challenged decision:

2. The Challenged Decision is that of the Supreme Court of the Republic of Kosovo, No. 262/2009, dated 26 June 2009.

Opposing Party

3. The Opposing Party is Kosovo Railways in Fushe-Kosova.

Subject matter

4. This Referral concerns the Decision of the Supreme Court of the Republic of Kosovo (hereafter: the "Supreme Court"), No. 262/2009, dated 26 June 2009 and served on the Applicant on 10 July 2009, wherein Halil Karafeta was the Applicant and the Respondent was Kosovo Railways.

5. The Supreme Court decided that the Applicant did not have a legal right to be restored to his previous employment with Kosovo Railways or to have it annul its decision per an internal vacancy announcement to re-hire someone other than the Applicant. The Supreme Court reversed the decisions of the Municipal and District Courts in Pristina and quashed the Judgments of those respective courts in this case.

Legal basis

6. Article. 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article. 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of 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.

Proceedings before the Constitutional Court

7. The Application was lodged with the Constitutional Court on 23 September 2009. The Judge Rapporteur appointed by the President of the Court was Judge Robert Carolan. A Review Panel of the Court was appointed comprising the President Enver Hasani, Chair, Judge Ivan Čukalović and Judge Snezhana Botusharova. On 29 April 2010 the Review Panel examined the Applicant's Referral and made a recommendation on the inadmissibility thereof to the full Court.

Facts.

8. Applicant was employed as a machinist with Kosovo Railways until 1 September 2005. At that time his employment was terminated along with 145 employees of Defendant because of economic and structural changes for the Defendant. This decision was made in compliance with UNMIK Regulation 2001/27.

9. On or about 27 June 2007 Kosovo Railways advertised internal vacancies for four employees in the position of machinist. The Applicant applied for one of those positions. On 10 July 2007 the Applicant was notified that he had not been selected for appointment to any one of those positions and explained that four other employees had been appointed to these positions because they met the requirements of the internal vacancies.

10. The Applicant then filed a claim with the Municipal Court of Pristina. alleging that, pursuant to UNMIK Regulation 2001/27, Section 12, he should have been awarded preferential treatment in the recruiting for those positions. He further claimed that he was terminated in 2005 for economic and structural reasons, pursuant to this regulation and that his termination was part of a large scale layoff of more than 50 employees within a 6 month period of time as that term is used in Regulation 2001/27. He also claimed that when an employer such as the Defendant subsequently recommences re-employment within a two year period of time from the date of his termination that preference (for re-hiring) would have to be given to those equally qualified employees who have been discharged (within the previous two years). Indeed, he finally claimed that another named employee, "a person who was never employed after the war ... and did not enjoy the same right as (he) did" was one of the persons to be successfully recruited for the position he was seeking.

11. The Municipal Court approved the Applicant's claim and the District Court of Pristina affirmed the decision of the Municipal Court. Kosova Railways then appealed to the Supreme Court from the decision of the District Court.

12. The Supreme Court reversed the decision of the District Court as well as the decision of the Municipal Court. It reasoned that the decision not to award one of the four available positions did not violate the law because:

    a) the other successful candidates for the posted positions were current employees of the Defendant who had the same preferential qualifications for the posted positions as the Applicant, and;

b) Regulation 2001/27 was not violated, because the successful recruits were also employees of the Defendant.

Allegations of the Applicant

13. Applicant alleges that the decision of the Supreme Court is unfair and unlawful based upon an erroneous interpretation of the applicable law and implies that his right to work as guaranteed by Article 49 of the Constitution has been effectively denied as a result of the allegedly erroneous decision of the Supreme Court.

Response of the Opposing Party

14. The Opposing Party, Kosovo Railways in Fushe-Kosova, did not respond to this Referral.

Assessment of the Admissibility of the Referral

15. **Article 49** of the Constitution provides that:

    "The right to work is guaranteed."

16. **Article 54** of the Constitution provides that:

    "Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated."

17. The Applicant appears to rely upon the above-referenced provisions of the Constitution as a basis for his claim although he does not state what specific provisions of the Constitution support his claim.

18. 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,* Garcia Ruiz v. Spain [GC], no. *30544/96,* § 28, European Court on Human Rights [ECHRJ1999-1).

19. 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, *Constituional Court Judgment of 23 June 2010, in the Case No. KI 40/09, Imer Ibrahimi and 48 other former employees*

of the Kosovo Energy Corporation against 49 individual judgments of the Supreme Court of the Republic of Kosovo, paras 66 and 67).

20. The Applicant merely disputes whether the Supreme Court correctly applied the applicable law and merely disagrees with the factual findings of the Supreme Court decision with respect to the employee status of the successful recruits for the disputed position it appears that the Applicant's claim is inadmissible

21. Having examined proceedings before the ordinary cours as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis,* Shub v. Lithuania, ECHR Decision as to the Admissibility of Application *no_17064/06* of 30 June 2009)_

22. Furthermore the Applicant had not submitted any *prima facie* evidence indicating a violation of his rights under the Constitution (*see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005*).

23. It follows that the Referral is manifestly ill-founded and must be rejected.

FOR THESE REASONS:

24. The Constitutional Court, pursuant to Article 113(7) of the Constitution, Article 20 of the Law, and Section. 55 of the Rules of Procedure, unanimously, in its session of 18 October 2010:

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Art. 20(4) of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan, signed	Prof. Dr. Enver Hasani, signed

Gani Prokshi and 15 other former employees of the Kosovo Energy Corporation vs. 16 individual judgments of the Supreme Court

Cases KI 58/09, 59/09. 60/09, 64/09, 66/09, 69/09, 70/09, 72/09, 75/09, 76/09, 77/09, 79/09, 3/10, 5/10, 13/10, 78/09 decision of 18 October 2010
Keywords: individual/group referrals, pension and invalidity pension, assessment of Constitutionality, right to property, right to fair and impartial trial.

Applicants filed referrals against 16 individual judgments of the Supreme Court, which annulled decisions of the Municipal Court and the District Court in Pristina, on allowing monetary compensation by the Kosovo Energy Corporation (KEK) on behalf of their pension rights. The applicants alleged that the right to fair and impartial trial and the right to property were violated.

The Court found as partially admissible the referral of one of the applicants who had already reached the age of 65, and was entitled to pension from the Ministry of Labour and Social Welfare. Therefore, the Court decided to review his referral for the period before he reached such age. On the other hand, in reviewing admissibility of referrals of other applicants, the Court, referring to its earlier judgment in the case "Imer Ibrahimi and 48 former employees of the Kosovo Energy Corporation versus 49 individual judgments of the Supreme Court of Kosovo, and to case law of the European Court of Human Rights, considered that the legal deadline of four months would not be taken into account, since the case in hand was a "continuing situation", which would exclude the legal deadlines for filing referrals. On these grounds, the Court found referrals of fifteen other applicants to be admissible.

In reviewing merits, similar to earlier cases, the Court decided that property rights of applicants were violated by termination of contracts they had signed with KEK, without fulfilling conditions of termination provided by the contract, respectively before establishment and operationalization of the Pension and Invalidity Insurance Fund. Furthermore, the Court also decided that there was a violation of the right to fair and impartial trial, as guaranteed by the Constitution and the European Convention on Human Rights, considering that the Supreme Court had neglected an important argument, the non-existence of the Pension and Invalidity Insurance Fund, in reaching its decisions.

Pristina, 18 October 2010
Ref. No.: AGJ 62 /10

JUDGMENT

Cases KI
58/09, 59/09, 60/09, 64/09, 66/09, 69/09, 70/09, 72/09, 75/09, 76/09, 77/09, 79/09, 3/10, 5/10, 13/10, 78/09
CASE OF GANI PROKSHI AND 15 OTHER FORMER EMPLOYEES OF KOSOVO ENERGY CORPORATION
Against
16 Individual Judgments of the Supreme Court 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

INTRODUCTION

1. This Judgment concerns Referrals made by the Applicants listed below which were lodged with the Constitutional Court by 16 former employees of the Kosovo Energy Corporation (KEK) between November 2009 and March 2010.

2. The present cases are similar– to Case KI No. 40/09, “Imer Ibrahimi and 48 other former employees of Kosovo Energy Corporation against 49 Individual Judgments of the Supreme Court of the Republic of Kosovo”. The Constitutional Court found that there has been a violation of Article 46 of the Constitution of the Republic of Kosovo (Protection of Property) in conjunction with Article 1 Protocol 1 to the European Convention on Human Rights as well as that there has been violation of Article 31 of the Constitution (Right to Fair and Impartial Trial) in conjunction with Article 6 of the European Convention on Human Rights with in relation to some of those Applicants. Consequently it was decided to declare invalid the Judgments delivered by the Supreme Court in some of those cases and Remand those cases to the Supreme Court for reconsideration

in conformity with the judgment of this Court (see the Judgment of the Constitutional Court of 23 June 2010).

The Applicants in the present case are as follows:

1. Gani Prokshi;
2. Ismet Ratkoceri;
3. Kadri Berisha;
4. Ali Shala;
5. Hasan Ibrahimi;
6. Rifat Draga;
7. Avdullah Sadiku;
8. Skender Smaili;
9. Vehbi Gashi;
10. Sardi Hyseni;
11. Sylejman Mustafa;
12. Nexhat Ejupi;
13. Hazir Kadriu;
14. Xhylsime Ymeri;
15. Ibrahim Kelmendi;
16. Ejup Selmani.

3. In this Judgement for ease reference the Applicants have been numbered and may be referred to collectively as the sixteen (16) former employees of Kosovo Energy Corporation (KEK)".

The Applicants challenge the following Judgments of the Supreme Court of Kosovo adopted in the cases of:

1. Gani Prokshi Rev.no. 208/08 dated 27/01/09;
2. Ismet Ratkocero Rev.no. 260/08 dated 10/02/09;
3. Kadri Berisha Rev.no. 125/08 dated 27/01/09;
4. Ali Shala Rev.no. 55/09 dated 02/02/09;
5. Hasan Ibrahimi Rev.no. 209/08 dated 16/06/09;
6. Rifat Draga Rev.no. 341/08 dated 11/02/09;
7. Avdullah Sadiku Rev.no. 488/08 dated 23/02/09;
8. Skender Smaili Rev.no. 176/08 dated 11/02/09;
9. Vehbi Gashi Rev.no. 225/08 dated 11/02/09;
10. Sardi Hyseni Rev.no. 219/08 dated 10/02/08;
11. Sylejman Mustafa Rev.no. 459/08 dated;
12. Nexhat Ejupi Rev.no. 477/08 dated 10/03/08;
13. Hazir Kadriu Rev.no. 204/09 dated 29/06/09;
14. Xhylsime Ymeri Rev.no. 23/02/09 dated 23/02/09;
15. Ibrahim Kelmendi Rev no: 543/08 dated 10/03/09;
16. Ejup Selmani Rev.no. 514/08 dated 11/02/09.

Subject matter

4. The subject matter of this Referral is the assessment of the constitutionality of the individual Judgments delivered by the Supreme Court of the Republic of Kosovo in the sixteen (16) individual cases of the Applicants against KEK as specified above.

Legal basis

5. The Referral is based on Article 113 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 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Summary of the facts as alleged by the Parties

6. The facts of these Referrals are similar to those in "the Case of Imer Ibrahimi and 48 others former employees of the Kosovo Energy Corporation v. 49 individual Judgments of the Supreme Court of the Republic of Kosovo", See the Judgement of Constitutional Court of Kosovo, dated 23 June 2010 (hereinafter referred to as "the case of Ibrahimi and others".

7. In the course of 2001 and 2002, each of the Applicants in this Referral, as with the Applicants in the said Judgment of 23 June 2010, signed an Agreement for Temporary Compensation of Salary for Termination of Employment Contract with their employer KEK. These Agreements were, in substance, the same.

8. Article 1 of the Agreements established that, pursuant to Article 18 of the Law on Pension and Invalidity Insurance in Kosovo (Official Gazette of the Social Autonomous Province of Kosovo No 26/83, 26/86 and 11/88) and at the conclusion of KEK Invalidity Commission, the beneficiary (i.e. each of the Applicant) is entitled a temporary compensation due to early termination of the employment contract until the establishment and functioning of the Kosovo Fund on Pension-Invalidity Insurance.

9. Article 2 of the Agreements specified that the amount to be paid monthly to each Applicant was to be 206 German Marks.

10. Article 3 specified that "payment shall end on the day that the Kosovo Pension-Invalidity Insurance Fund enters into operation. On that day onwards, the beneficiary may realize his/her rights in the Kosovo Pension

and Invalidity Insurance Fund (the Kosovo Pension Invalidity Fund), and KEK shall be relieved from liabilities to the User as per this Agreement."

11. On 1 November 2002, the Executive Board of KEK adopted a Decision on the Establishment of the Pension Fund, in line with the requirements of UNMIK Regulation No 2001/30 on Pensions in Kosovo. Article 3 of this Decision reads as follows: "The Pension Fund shall continue to exist in an undefined duration, pursuant to terms and liabilities as defined with Pension Laws, as adopted by Pension Fund Board and KEK, in line with this Decision, or until the legal conditions on the existence and functioning of the Fund are in line with Pension Regulations or Pension Rules adopted by BPK."

12. On 25 July 2006, the KEK Executive Board annulled the above mentioned Decision on the Establishment of the Supplementary Pension Fund and terminated the funding and functioning of the Supplementary Pension Fund, with effect from 31 July 2006. According to the Decision of 25 July 2006, all beneficiaries were guaranteed full payment in line with the Fund Statute. Furthermore the total obligations towards beneficiaries were 2, 395,487 Euro, banking deposits were 3,677,383 Euro and asset surplus from liability were 1,281,896 Euro. The Decision stated that KEK employees that are acknowledged as labour disabled persons by the Ministry of Labour and Social Welfare shall enjoy rights provided by the Ministry. On 14 November 2006, KEK informed the Central Banking Authority that "decision on revocation of the KEK Pension Fund is based on decision of the KEK Executive Board and the Decision of the Pension Managing Board... <u>due to the financial risk that the scheme poses to KEK in the future</u>."

13. According to the Applicants, KEK terminated the payment stipulated by the Agreements in the summer of 2006 without any notification. The Applicants claim that such an action is in contradiction to the Agreements signed.

14. The Applicants also claim that it is well known that the Kosovo Pension Invalidity Fund has not been established yet.

15. On the other hand, in the original case, KEK contested the Applicants' allegations arguing that it was widely known that the Invalidity Pension Fund had been functioning since 1 January 2004.

16. According to KEK, the Applicants were automatically covered by the national invalidity scheme pursuant to UNMIK Regulation No 2003/40 on Promulgation of the Law on Invalidity Pensions in Kosovo (Law No 2003/23).

17. KEK further argued that on 31 August 2006 it issued a Notification according to which all beneficiaries of the KEK Supplementary Fund had been notified that the Fund was terminated. The same notification confirmed that all beneficiaries were guaranteed complete payment in compliance with the SPF Statute, namely 60 months of payments or until the beneficiaries reached 65 years of age, pursuant to the Decision of the Managing Board of the Pension Fund of 29 August 2006.

18. KEK further argued that the Applicants did not contest the Instructions to invalidity pension and signature for early termination of employment pursuant to the conclusion of the Invalidity Commission.

19. The Applicants sued KEK before the Municipal Court in Pristina, requesting the Court to order KEK to pay unpaid payments and to continue to pay 105 Euro (equivalent to 206 German Marks) until conditions are met for the termination of the payment.

20. The Municipal Court in Pristina approved the Applicants' claims and ordered monetary compensation. The Municipal Court of Pristina found (e.g. the Judgment C. Nr. 321/2006 of 27 July 2007 in the case of the first Applicant Gani Prokshi) that the conditions provided by Article 3 of the Agreements have not been met. Article 3 of the Agreements provides for salary compensation until exercise of the Applicants' right, "which means an entitlement to a retirement scheme, which is not possible for the plaintiff, because he has not reached the age of 65."

21. The Municipal Court further stated in the above quoted judgment that payment of compensation cannot be connected to provisions of the Supplementary Pension Statute, since the Agreements were signed earlier and the Statue has not provided that the Agreements that entered into earlier cases shall cease to be valid. This Court also clarified that according to Article 262 of the Law on Obligations and Contracts the creditor (i.e. an Applicant) was entitled to seek performance of the obligation, while the debtor (i.e. KEK) is bound to perform such obligation.

22. KEK appealed against the judgments of the Municipal Court to the District Court, arguing, *inter alia,* that the Municipal Court judgment was not fair because the Agreements were signed with the Applicants because of the invalidity of the Applicants and that they can not claim continuation of their working relations because of their invalidity.

23. KEK reiterated that the Court was obliged to decide upon the UNMIK Regulation 2003/40 on the promulgation of the Law on Invalidity

Pensions according to which the Applicants were entitled to an invalidity pension.

24. The District Court in Pristina rejected the appeals of KEK and found their submissions ungrounded.

25. KEK submitted a revision to the Supreme Court because of an alleged essential violation of the Law on Contested Procedure and erroneous application of material law (Revision by KEK of 27 January 2009 in the case of the first named Applicant, Gani Prokshi). It repeated that the Applicants were entitled to the pension provided by the 2003/40 Law and that because of humanitarian reasons it continued to pay monthly compensation after the Law entered into force. It argued that the age of the applicant was not relevant but that his invalidity was.

26. The Supreme Court accepted the revisions of KEK, and quashed the judgments of the District Court and the Municipal Court in Pristina and rejected as unfounded the Applicants' lawsuits.

27. The Supreme Court argued that the manner of termination of employment was considered lawful pursuant to Article 11.1 of UNMIK Regulation 2001/27 on the Basic Labour Law in Kosovo.

28. In its Judgment in the case of Gani Prokshi, Rev.Nr.208/2008 of 27 January 2009, the Supreme Court stated): "Taking into account the undisputed fact that the respondent party fulfilled the obligation towards the plaintiff, which is paying salary compensation according to the specified period which is until the establishment and functioning of the Invalidity and Pension Insurance Fund in Kosovo effective from 1 January 2004, the Court found that the respondent party fulfilled the obligation as per the agreement. Thus the allegations of the plaintiff that the respondent party has the obligation to pay him the temporary salary compensation after the establishment of the Invalidity and Pension Insurance Fund in Kosovo are considered by this Court as unfounded because the contractual parties until the appearance of solving condition- establishment of the mentioned fund have fulfilled their contractual obligations..."

29. On 15 May 2009, Kosovo Ministry of Labour and Social Welfare issued the following note: "The finding of the Supreme Court of Kosovo, in its reasoning of e.g. Judgment Rev. I No 208/2008, that in the Republic of Kosovo there is a Pension and Invalidity and Pension Insurance Fund which is functional since 1 January 2004 is not accurate and is ungrounded. In giving this statement, we consider the fact that UNMIK regulation 2003/40 promulgates the Law No 2003/213 on the pensions

of disabled persons in Kosovo, which regulates over permanently disabled persons, who may enjoy this scheme in accordance with conditions and criteria as provided by this law. Hence let me underline that the provisions of this Law do not provide for the establishment of a Pension and Invalidity Insurance in the country. Establishment of the Pension and Invalidity Insurance Fund in the Republic of Kosovo is provided by provisions of the Law on pension and Invalidity Insurance funds, which is in the process of drafting and approval at the Government of Kosovo." The same note clarified that at the time of writing that note, the pension *inter alia* existed "Invalidity pension in amount of 45 Euro regulated by the Law on Pensions of Invalidity Persons (beneficiaries of these are all persons with full and permanent Invalidity)" as well as "contribution defined pensions of 82 Euro that are regulated by Decision of the Government (the beneficiaries of these are all the pensioners that have reached the pensions age of 65 and who at least have 15 years of working experience)".

Complaints

30. The Applicants complain that their rights have been violated because KEK unilaterally annulled their Agreements although the condition prescribed in Article 3, the establishment of the Kosovo Pension-Invalidity Insurance Fund) had not been fulfilled. The Applicants further argued that they have not been able to remedy such violation before the ordinary courts. While all the Applicants do not explicitly complain of a violation of the European Convention on Human Rights (ECHR), it appears from the Applicants' submissions that the subject of the complaints are their property rights (as guaranteed by Article 1 Protocol 1 to the ECHR) as well as their right to fair trail (as guaranteed by Article 6 of the ECHR).

Summary of the proceedings before the court

31. Between November 2009 and March 2010, the Applicants individually, filed the Referrals to the Constitutional Court. The President of the Court appointed Judge Kadri Kryeziu as Judge Rapporteur and appointed a Review Panel of the Court composed of Judges Altay Suroy (Presiding), Enver Hasani and Iliriana Islami.

32. On 25 May 2010, the Constitutional Court notified the Supreme Court, in accordance with Article 26 of the Law, that these applicants challenged individual judgments that the Supreme Court adopted.

33. On the same day the, the Constitutional Court notified KEK as an interested party regarding the submission of the above referrals.

34. The Supreme Court of the Republic of Kosovo on 27 May 2010 has stated that all the comments regarding these cases can be found in the relevant Judgment of the Supreme Court.

35. KEK responded in writing on 2 June 2010, stating that all of the above cases are identical to those of Case KI 40/09 and thus they has previously given its comments in the session for case KI 40/09 held on 30 April 2010.

36. On 12 October 2010 the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

37. 9. The full Court deliberated and voted in a private session on the Referral on 12 October 2010.

Admissibility

38. As was done in the case of Ibrahimi and others, already referred to, in order to be able to adjudicate the Applicants' Referral the Constitutional Court needs first to examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution.

39. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

"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";

and to Article 47.2 of the Law, stipulating that:

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

40. The Court further has to consider whether Applicants submitted their Referral within the four months time limit prescribed by Article 49 of the Law. In this connection, the Constitutional Court refers to Article 49 of the Law, which stipulates 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced..."*

41. The Court recalls that in the present case, as in the case of Ibrahimi and others case the Applicants still suffer from the unilateral annulment of their Agreements signed by KEK. They raised the same argument as the Applicants in the earlier that it is well known that the Pension and Invalidity Insurance Fund has not been established to date. Therefore, there is a continuing situation. As the circumstance of which the Applicants complain continued, the four months period as prescribed in Article 49 of the Law is inapplicable to these cases.

42. The Constitutional Court is cognizant that one of the Applicants, namely Ejup Selmani was older than 65 years at the time of submitting his Referral to this Court.

43. The Constitutional Court recalls that according to the Note issued by the Ministry of Labour and Social Welfare on 15 May 2009 persons who have reached the pensions age of 65 and who have at least 15 years of working experience are entitled to pension in a monthly amount of 82 Euro. The substance of this Note was confirmed by the representative of the Ministry at the public hearing that the Constitutional Court held on 30 April 2010 in the case of Ibrahimi and others.

44. It appears consequently that the above listed Applicant Ejup Selmani is entitled for pension from the moment when they reached the age of 65.

45. However, the complaint of Ejup Selmani, to the extent of unpaid compensation for the period prior to that moment, on account of a continuing situation, remains at issue and is partly admissible.

46. With regard to the remaining Applicants, the Constitutional Court does not find any reason for inadmissibility of the Referral.

47. The Court further considers that it is appropriate to join the Referrals pursuant to Rule 36 of the Rules of Procedure.

Merits

48. The Court recalls its Judgement of 23 June 2010 adopted in the earlier KEK case. in which the it found that there has been a violation of Article 46 of the Constitution of the Republic of Kosovo (Protection of Property) in conjunction with Article 1 Protocol 1 to the European Convention on Human Rights as well as that there has been violation of Article 31 of the Constitution (Right to Fair and Impartial Trial) in conjunction with Article 6 of the European Convention on Human Rights with regard to the same Applicants. Consequently it was decided to declare invalid the

judgments delivered by the Supreme Court in the Applicants' cases and remit those judgments to the Supreme Court for reconsideration in conformity with the judgment of this Court.

i. as regards the Protection of Property

49. The Applicants complain that their rights have been violated because KEK unilaterally annulled their Agreements although the condition prescribed in Article 3 (i.e. Establishment of the Kosovo Pension-Invalidity Insurance Fund) had not been fulfilled. In substance, the Applicants complain that there has been a violation of their property rights.

50. At the outset, the following legal provisions should be recalled:

Article 53 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."

Article 46 [Protection of Property] of the Constitution reads as follows

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.

Article 1 of Protocol No. 1 of the European Convention on Human Rights provides

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the

use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

51. According to the case law of European Court of Human Rights, an Applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision.

52. Furthermore, "possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition" (see *the case of Ibrahimi and others* Isee also Prince Hans-Adam II of Liechtenstein v. Germany, no. 42527/98, paras 82-83, ECHR 2001-VIII; and Gratzinger and Gratzingerova v. the Czech Republic (dec.) [GC], no. 39794/98, para. 69, ECHR 2002-VII).

53. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, confer on the Applicant a title to a substantive interest protected by Article 1of Protocol No. 1 to the ECHR.*the case of Ibrahimi and others*

54. The Constitutional Court notes that, at the time of concluding the Agreements between the Applicants and KEK, these type of agreements have been regulated by the Law on Contract and Torts (Law on Obligations) published in Official Gazette SFRJ 29/1978 and amended in 39/1985, 45/1989, 57/1989.

Article 74(3) of the Law on Contract and Torts reads as follows:

"After being concluded under rescinding condition (raskidnim uslovom) the contract shall cease to be valid after such condition is valid

55. The crux of the mater is therefore whether the rescinding condition under which the Agreements were signed has been met. Answering that question will allow the Constitutional Court to assess whether the circumstances of this Referral, considered as a whole, confer on the Applicants title to a substantive interest protected by Article 1of Protocol No. 1 to the ECHR.
56. The Constitutional Court notes that it is clear from the documents and it is undisputable between the parties that the "rescinding

condition" under which the Agreements have been signed is the establishment and functioning of the Kosovo Fund on Pension-Invalidity Insurance.

57. In this respect, the Constitutional Court also notes that, according to the Ministry of Labour and Social Welfare, the establishment of the Pension and Invalidity Insurance Fund, was to be provided by the Law on Pension and Invalidity Insurance Funds. This was in the process of drafting and approval with the Government of Kosovo. .

58. The Constitutional Court considers that the Applicants, when signing the Agreements with KEK, had a legitimate expectation that they would be entitled to the monthly indemnity in the amount of 105 Euro until the Pension and Invalidity Insurance Fund was established.

59. Such legitimate expectation is guaranteed by Article 1 of Protocol No. 1 to the Convention, its nature is concrete and not a mere hope, and is based on a legal provision or a legal act, i.e. Agreement with KEK (*the case of Ibrahimi and others) para*. 61; also *mutatis mutandis* Gratzinger and Gratzingerova v. the Czech Republic (dec.), no. 39794/98, para 73, ECHR 2002-VII).

60. Therefore, the Constitutional Court considers that the Applicants have a "legitimate expectation" that their claim would be dealt in accordance with the applicable laws, in particular the above quoted provisions of the Law on Contract and Torts and the Law on Pension and Invalidity Insurance in Kosovo, and consequently upheld (*the case of Ibrahimi and others* , cited above para. 62; -III).

61. However, the unilateral cancellation of the Agreements, prior to the rescinding condition having been met, breached the Applicants' pecuniary interests which were recognized under the law and which were subject to the protection of Article 1 of Protocol No. 1. (see *the case of Ibrahimi and others* para. 63).

62. Consequently, the Constitutional Court concludes that there is a violation of Article 46 of the Constitution in conjunction Article 1 of Protocol 1 to the European Convention on Human Rights.

ii. as regards the right to fair trail

63. The Applicants further complain that they have not been able to the remedy violation of their property rights before the ordinary courts.

Article 31 [Right to Fair and Impartial Trial] of the Constitution, reads as follows:

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

Article 6 of the European convention on Human Rights

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

64. 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, including the Supreme Court. In general, "Courts shall adjudicate based on the Constitution and the law" (Article 102 of the Constitution). More precisely, the role of the ordinary courts is to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, paragraph 28, European Court on Human Rights [ECHR] 1999-I).

65. On the other hand, "The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution" (Article 112. 1 of the Constitution. Thus, 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).

66. According to the jurisprudence of the European Court of Human Rights, Article 6 paragraph 1 of the ECHR obliges courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is, moreover, necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. Thus the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case (see *the case of Ibrahimi and others* and Ruiz Torija v. Spain, judgment of 9 December 1994, Series A no. 303-A, § 29).
67. In the present case, the Applicants requested the ordinary courts to determine their property dispute with the KEK. The Applicants referred, in particular, to the provision of Article 3 of the Agreements, stating that

the Law on Pension that establishes Pension and Invalidity Insurance Fund has not been adopted yet. This fact has been confirmed by the representative of the responsible Ministry of Labour and Social Welfare.

68. However, the Supreme Court made no attempt to analyze the Applicants' claim from this standpoint, despite the explicit reference before every other judicial instance. Instead the Supreme Court view was that it was an undisputed fact that the respondent party (KEK) fulfilled the obligation towards the plaintiff, which was paying salary compensation according to specified period which was until the establishment and functioning of the Invalidity and Pension Insurance Fund in Kosovo effective from 1 January 2004.

69. It is not the task of the Constitutional Court to decide what would have been the most appropriate way for the ordinary courts to deal with the Applicants' argument, i.e. fulfilling the rescinding condition of Article 3 of the Agreements, which fulfilment is also regulated by Article 74(3) of the Law on Contract and Torts taken in conjunction with Article 18 of the 1983 Law on Pension and Invalidity Insurance.

70. However, in this Court's opinion, the Supreme Court, by neglecting the assessment of this point altogether, even though it was specific, pertinent and important, fell short of its obligations under Article 6 para 1 of the ECHR.(see Imer Ibrahimi and 48 other former employees of KEK, cited above para. 73 *mutatis mutandis,* European Court of Human Rights, Judgment of 18 July 2006 in the case Pronina v. Ukraine, Application no. 63566/00.)

71. In view of the above, the Constitutional Court concludes that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

FOR THESE REASONS, THE COURT UNANIMOUSLY DECIDES AS FOLLOWS:

I. TO JOIN THE REFERRALS;

II. TO DECLARE AS

a) *Admissible* the Referral with regard to the following Applicants:

1. Gani Prokshi
2. Ismet Ratkoceri
3. Kadri Berisha
4. Ali Shala
5. Hasan Ibrahimi

6. Rifat Draga
7. Avdullah Sadiku
8. Skender Smaili
9. Vehbi Gashi
10. Sardi Hyseni
11. Sylejman Mustafa
12. Nexhat Ejupi
13. Hazir Kadriu
14. Xhylsime Ymeri
15. Ibrahim Kelmendi

b) *Partly admissible* the Referral with regard to the following Applicant:

16.Ejup Selmani;

III.TO FIND THAT

a) ***There has been a violation of Article 46 of the Constitution of the Republic of Kosovo*** in conjunction with Article 1 Protocol 1 to the European Convention on Human Rights, in the cases of all Applicants namely, Gani Prokshi, Ismet Ratkoceri, Kadri Berisha, Ali Shala, Hasan Ibrahimi, Rifat Draga, Avdullah Sadiku, Skender Smaili, Vehbi Gashi, , Sardi Hyseni, Sylejman Mustafa, Nexhat Ejupi, Hazir Kadriu, Xhylsime Ymeri and Ibrahim Kelmendi and Ejup Selmani.

b) ***There has been violation of Article 31 of the Constitution*** **in** conjunction with Article 6 of the European Convention on Human Rights with regard to the same Applicants who suffered violation of Article 46 of the Constitution

IV.*Declares invalid the judgments delivered by the Supreme Court* in the following cases:

1. Gani Prokshi Rev.no. 208/08 dated 27.01.09;
2. Ismet Ratkocero Rev.no. 260/08 dated 10.02.09;
3. Kadri Berisha Rev.no. 125/08 dated 27.01.09;
4. Ali Shala Rev.no. 55/09 dated 02.02.09;
5. Hasan Ibrahimi Rev.no. 209/08 dated 16.06.09;
6. Rifat Draga Rev.no. 341/08 dated 11.02.09;
7. Avdullah Sadiku Rev.no. 488/08 dated 23.02.09;
8. Skender Smaili Rev.no. 176/08 dated 11.02.09;
9. Vehbi Gashi Rev.no. 225/08 dated 11.02.09;
10. Sardi Hyseni Rev.no. 219/08 dated 10.02.08;
11. Sylejman Mustafa Rev.no. 459/08 dated10.03.09;

12. Nexhat Ejupi Rev.no. 477/08 dated 10.03.08;
13. Hazir Kadriu Rev.no. 204/09 dated 29.06.09;
14. Xhylsime Ymeri Rev.no. 23/02/09 dated 23.02.09;
15. Ibrahim Kelmendi Rev no: 543/08 dated 10.03.09;
16. Ejup Selmani Rev.no. 514/08 dated 11.02.09.

V. **REMAND these Judgments to the Supreme Court** for reconsideration in conformity with the judgment of this Court

VI. **REMAINS seized of the matter** pending compliance with that Order.

This Judgment shall have effect immediately on delivery to the parties.

Done at Pristina 15 October 2010

Judge Rapporteur	**President of the Constitutional Court**
Mr.Sc. Kadri Kryeziu, signed	Prof. Dr. Enver Hasani, signed

Jovica Joksimovic vs. Decision SCLE-09-001 of the Special Chamber of the Supreme Court of Kosovo

Case KI 12/10, Decision of 18 October 2010
Key words: Individual referral, right to work and exercising profession

The applicant submitted a referral to the Constitutional Court, alleging that his right to work and exercise profession was violated by the Supreme Court of Kosovo, where he complaint against the PAK for not including him in the list of legitimate workers to receive his share of the 20% of revenues from the privatization of the enterprise where he had been working. He alleges to have been part of the payroll for more than 11 years, and that he should have been included in the list.

The Constitutional Court decided to reject applicant's referral as inadmissible, with reasoning that the request is untimely (premature), since the case was not decided yet by the Special Chamber of the Supreme Court, therefore not all legal remedies available have been exhausted.

Pristina, 18 October 2010
Ref. No.: RK 61/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 12/10
Applicant
Jovica Joksimovic
vs.
Decision of the Special Chamber of the Supreme Court of Kosovo, SCLE-09-001, dated 5 January 2010

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

Applicant

1. The Applicant is Mr. Jovica Joksimovic, residing in Čaglavica Village.

Challenged decision

2. The decision challenged by the Applicant is the Decision of the Special Chamber of the Supreme Court of Kosovo (hereinafter: the "Special Chamber"), SCLE-09-001, dated 5 January 2010.

Subject matter

3. The Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Constitution") on 29 January 2010 claiming an alleged violation of the right to work pursuant to Article 49 of the Constitution.

Legal basis

4. Article 113.7 of the Constitution, Article 22 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. On 29 January 2010, the Applicant submitted the Referral to the Court, alleging a violation of Article 49 [Right to Work and Exercise Profession] of the Constitution.

6. On 23 August 2010, the Referral was communicated to the Privatization Agency of Kosovo (hereafter: "PAK"), which, so far, has not submitted any comments.

7. On 20 August, the Court requested the Special Chamber to submit a copy of the relevant decision and futher information. On 5 September 2010, the Special Chamber notified the Court that the Applicant "submitted his complaint with the Chamber on 25 March 2009, asking his inclusion in the Eligible Workers List of Socially Owned Enterprise "Ramiz Sadiku", Pristina", and that the Applicant "was summoned for a hearing and he has appeared before the Court on 28 of April 2010".

8. The Special Chamber further informed the Court that in the Applicant's case no judgment had been issued yet, since the proceedings are still

pending and that no judgment had ever been issued on 5 January 2010 by the Special Chamber, the hearings not having been held yet.

9. Finally, the Chamber emphasized that, until 10 September 2010, it had not issued any judgment related to the Applicant's case, which was still pending.

10. On 28 September 2010, the Review Panel, consisting of Deputy President Kadri Kryeziu (Presiding), and Judges Gjyljeta Mushkolaj and Iliriana Islami, considered the Report of the Judge Rapporteur Snezhana Botusharova and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

11. On 27 September 2007, the Applicant filed a complaint with PAK claiming that he should be included in the list of workers eligible for 20 % of the sale proceeds from the privatization of the Socially Owned Enterprise (hereafter: the "SOE") "Ramiz Sadiku".

12. On 4 March 2009, PAK published, in the daily newspaper "Koha Ditore", the list of workers eligible for 20 % of the sale proceeds from the privatization of the SOE "Ramiz Sadiku". The Applicant's name was apparently not in the list.

13. On 25 March 2009, the Applicant, together with others, filed a complaint against PAK with the Special Chamber of the Supreme Court of the Republic of Kosovo (hereafter: the "Special Chamber").

14. On 2 April 2009, PAK filed a response with the Special Chamber with respect to the Applicant's complaint, stating that, at the time of the privatization, i.e. on 27 June 2006, the Applicant was not registered as an employee with the SOE due to the fact that the Applicant worked with the SOE from 1977 until 1988, when he left and got employed elsewhere. Hence, the Applicant was considered by PAK not to be eligible for the 20 % sale proceeds from the privatization of the SOE.

15. On 5 January 2010, the Special Chamber sent the response of PAK to the Applicant and other complainants, providing them the possibility to submit comments.

16. The Special Chamber heard the case on 28 April 2010 and informed this Court, on 15 September 2010, that the Applicant's case was still pending before it.

Applicant's allegations

17. The Applicant alleges that his name should be in the list of eligible workers for the 20 % of the sale proceeds from the privatization of the SOE. In this connection, the Applicant refers to Section 10.4 of UNMIK Regulation No. 2003/13 on the transformation of the right of use to socially owned immovable property (hereinafter: "UNMIK Regulation 2003/13"), reading as follows :

    "For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially-owned Enterprise at the time of privatisation and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6."

18. He alleges that he was on the payroll for over 11 years and that, consequently, his right was violated because, proportionately to the years and months spent with the SOE, he should have the right to appropriate financial compensation from the 20% sale proceeds of the privatization of the SOE.

Assessment of the admissibility of the Referral

19. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure.

20. 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. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). 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 is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).

21. This Court applied this same reasoning when it issued a Resolution on Inadmissibility on 27 January 2010 on the grounds of non exhaustion of

remedies in Case No. KI-41/09, AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, and in its Decision of 23 March 2010 in Case No. KI. 73/09, Mimoza Kusari-Lila vs. The Central Election Commission.

22. Bearing this in mind it is clear from the documentation submitted by the Special Chamber on 15 September 2010 that the case is still pending before the Special Chamber. It follows that the Applicant has not exhausted all legal remedies available to him under applicable law as required for him to be able to pursue a claim to the Court.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, 47 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously, in its session of 18 October 2010:

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova, signed	Prof. Dr. Enver Hasani, signed

Fillim Musa Guga vs. decisions of the Special Chamber of the Supreme Court of Kosovo, SCEL- 08-0001 and SCEL-08-0001

Case KI 33/09, decision of 18 October 2010
Keywords: individual referral, equality before the law, the right to liberty and security

The applicant filed a referral requesting the assessment of constitutionality of Decisions of Special Chamber of the Supreme Court where the applicant filed a complaint against the KTA, which did not include him in the list of legitimate workers who would benefit from 20% of the revenues from privatisation of the factory where he used to work. He contended that in this case his human rights were denied, as well as equality before the law and the right to liberty and security were violated.

The Constitutional Court decided to reject applicant's referral as inadmissible with reasoning that the referral is time barred as it was submitted after the deadline foreseen by the Law on the Court and as such is cannot be considered that the applicant has met the admissibility criteria.

Pristina, 18 October 2010
Ref. No.: RK 57/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 33/09
Fillim Musa Guga
vs.
Decisions of the Special Chamber of the Supreme Court of Kosovo, SCEL-08-0001 of 17 June 2008 and SCEL-08-0001 of 10 September 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 Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Fillim Musa Guga, residing in Gjakova.

Challenged Decisions

2. The Applicant challenges Decisions SCEL-08-0001 of 17 June 2008 and SCEL-08-0001 of 10 September 2008 of the Special Chamber of the Supreme Court of Kosovo (hereinafter "the Special Chamber").

Subject Matter

3. The Applicant alleges that the decisions of the Special Chamber are in violation of Article 24 [Equality before the Law], Article 29 [Right to Liberty and Security] of the Consitution of the Republic of Kosovo (hereinafter: the "Constitution") and Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "Article 1 of the Protocol").

Legal Basis

4. Article 113 (7) of the Constitution, Article 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. On 27 July 2009, the Applicant submitted the Referral to the Court, requesting the Court to evaluate the constitutionality of the above Decisions of the Special Chamber. On 30 January 2010, the Applicant submitted additional documents and supplemented the Referral with further arguments.

6. On 4 February 2010, the Court sent a request to the Special Chamber to submitt to the Court those decisions of Special Chamber to which the Applicant had referred in his Referral. On 15 March 2010, the Special Chamber sent the decisions and documents in connection with the decisions concerned.

7. On 4 February 2010, the Court sent a request to the Applicant requesting the decisions of the Special Chamber and other supporting documents for his statements in his Referral. The Applicant has not replied.

8. On 24 June 2010, the Court requested the Applicant to reply to certain questions, but he has, so far, not responded to these questions. Instead he submitted a copy of the response of the Special Representative of the Secretary General (hereinafter: the "SRSG") to the UNMIK Advisory Panel for Human Rights, Ref. No. 47/08, to which the Applicant had submitted a similar claim. The Panel, however, rejected the Applicant's claim as manifestly ill-founded.

9. On the same day, the Court requested the Municipal Court of Gjakova to submit the court decisions referred to by the Applicant. On 5 July 2010, the Municipal Court of Gjakova submitted to the Court copies of these decisions.

10. On 13 July 2010, the Review Panel, consisting of Judges Altay Surroy (Presiding), Enver Hasani and Ivan Čukalovič, considered the Report of the Judge Rapporteur Snezhana Botusharova and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

11. It appears from the documents submitted by the Applicant that he worked at the Socially Owned Enterprise (SOE) KNI “Dukagjini OTHPB-BP IMN Tjegulltorja” (hereinafter the “IMN”) until 1999, when he was forced to leave Kosovo for Montenegro due to the events which happened in Kosovo at that time.

12. The Contract of Employment of the Applicant was terminated by the Disciplinary Commission of the “IMN” on 24 August 2000 with effect from 23 March 1999 (Decision to terminate the contract of employment no. 185/00 of 24 August 2000).

13. The workers were notified and summoned to a disciplinary hearing, but only certain workers replied. The Applicant did not reply to the summons. “IMN” took into consideration the situation that existed in Kosovo at the time and, therefore, did not take any disciplinary procedures one year after these events. However, the contract of employment of the workers who had not replied and had been absent from work without any valid reasons was terminated.

14. “IMN” was privatized on 31 July 2006 and, consequently, pursuant to Section 10 (3) of UNMIK Regulation 2003/13 on the Transformation of the Right to use Socially Owned Immovable Property (hereinafter: UNMIK Regulation 2003/13), the Kosovo Trust Agency (hereinafter: "KTA") published the official list of the employees eligible to receive 20 % of the proceeds from the privatization of the SOE. In this list only the

names of a number of non-Albanian workers, who had returned to work after the war and had been put in the list of eligible workers for the 20% of the proceeds from the privatization of the SOE, appeared.

15. Apparently, it is the representative body of employees in the enterprise, in cooperation with the Federation of Trade Unions of Kosovo, which establishes the list of eligible employees and submits it to the KTA. The KTA then reviews the list and makes the necessary amendments to ensure equitable access by all eligible employees to the funds to be distributed. Afterwards, the list is published, together with a notice of the right of any aggrieved party to complain, which is published in major newspapers in the Albanian and Serbian languages.

16. Section 10 (4) of UNMIK Regulation 2003/13 expressly provides that an employee shall be considered eligible, if such employee is registered as an employee with the SOE at the time of privatization and if it has been established that his name has appeared on the payroll of the enterprise for less than three years. The failure to fulfill such requirement shall not preclude the inclusion in the list of an employee who claims that he would have been eligible, had he not been subject to discrimination.

17. Since his name did not appear on the list of the 20 % of the sale proceeds of "IMN", the Applicant submitted a complaint to the Special Chamber, pursuant to UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (hereafter: "UNMIK Regulation 2002/13).

18. On 17 June 2008, the Special Chamber concluded, in its Decision SCEL-08-0001, that the Applicant had indeed worked with the SOE from 1979 to June 1999. After June 1999 he stayed in Montenegro for a long time due to security concerns and after his return to Kosovo he tried to be reinstated into his former employment. The Special Chamber concluded that the Applicant failed to submit facts from which it could be presumed that he had been directly or indirectly discriminated against. Further, he failed to comply with the requirements of Section 10 (6) read in conjunction with Section 10 (4) of UNMIK Regulation 2003/13. Hence, his inclusion in the list of eligible employees was not accepted.

19. The Applicant submitted an appeal against the decision of the Special Chamber, pointing out that, through the contested decision, he had been denied the right of appeal contrary to UNMIK Regulation 2008/4 (Amending UNMIK Regulation No. 2002/13).

20. By Decision SCEL-08-0001 of 10 September 2008 the Special Chamber concluded that Section 9 (7) of UNMIK Regulation 2002/13 prescribes

that the decision, taken in relation with the decision of a claim, is final and binding for the present party and must be executed by the responsible executive bodies in compliance with the applicable law. According to the Special Chamber, the allegations of the Applicant did not have any legal basis, due to the fact that Section 9(5) of UNMIK Regulation 2008/4, which enables the appeal of the decisions of the Special Chamber, was not applicable and could not be invoked. Through UNMIK Regulation 2008/19 Amending UNMIK Regulation No. 2008/4 and UNMIK Regulation 2008/29 Amending UNMIK Regulation No. 2008/4, the applicability of UNMIK Regulation 2008/4 was postponed until 31 October 2008. Consequently, when the decision of the Special Chamber was taken on 17 June 2008, UNMIK Regulation 2008/4 was not applicable at that time.

Applicant's allegations

21. The Applicant alleges that he has never received the decision of the Disciplinary Commission and that he was not invited to the disciplinary hearing. Furthermore, he claims that he had never received any response of the Kosovo Trust Agency.

22. The Applicant also alleges that, after his return from Montenegro, he tried to return to work, but was refused, allegedly, because he is of Egyptian origin. He submits that he even took steps to initiate the procedure before the regular courts of Kosovo to be reinstated in his previous employment, but that his request was rejected.

23. The Applicant states that he had never submitted the decisions from the regular courts to the Special Chamber, because he was of the opinion that the object of the claim before the Special Chamber was the 20 % of the sale proceeds. Hence, he had thought that they were of no importance.

24. In sum, the Applicant complains of the failure of KTA to include him, during the privatization process of "IMN" and the subsequent decisions of the Special Chamber in the list of employees eligible to the 20 % of the proceeds of the privatization of the "IMN". In the Applicant's view, the exclusion from the list was made in a discriminatory way due to his Egyptian ethnicity, while the same right had not been denied to a number of Serbian workers, whom he mentions by name.

Assessment of the admissibility of the Referral

25. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility

requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

26. As to the Applicant's Referral, the Court refers to Article 49 of the Law, which reads as follows:

    "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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced.

27. From the submitted documents, it appears that the Referral has not been filed within the time limit pursuant to Article 49 of the Law.

28. The final decision of the Special Chamber was taken on 10 September 2008, whereas the Applicant filed the Referral with the Secretariat of the Constitutional Court on 27 July 2009.

29. The Court, therefore, concludes that the Referral must be rejected as inadmissible, pursuant to Article 49 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 49 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously, in its session of 18 October 2010:

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova, signed	Prof. Dr. Enver Hasani, signed

Petrit Morina vs. the Judgment AP. No. 495/2003 of the Supreme Court of Kosovo

Case KI 20/09, decision of 18 October 2010
Keywords: individual referral, right to fair and impartial trial

The applicant filed a referral by which he claims that his right to fair and impartial trial was violated by the judgment of the Supreme Court, which according to him, had erroneously sentenced him for one of the criminal offences he was accused for, because it had failed to consider evidence he had offered for the contrary.

The Constitutional Court decided to reject the referral as inadmissible, thereby reasoning that the complaint of the applicant dates before the entry into force of the Constitution, and therefore, the Court found this referral to be time-barred and in contradiction in *"ratione temporis"* with provisions of the Constitution and the law.

Pristina, 18 October 2010
Ref. No.: RK 56/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 20/09
Petrit Morina
vs.
Judgment AP.Nr.495/2003 of the Supreme Court of Kosovo, dated 7 April 2004,

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

Applicant

1. The Applicant is Mr. Petrit Morina from the Village of Polluzhe in the Municipality of Rahovec.

Challenged Decision

2. The Applicant challengesJudgment AP.Nr.495/2003 of the Supreme Court of Kosovo dated 7 April 2004.

Subject Matter

3. The Applicant requests the Constitutional Court to consider his complaint that, regarding one of the offences, for which he was charged with robbery, he had provided evidence that he was innocent. He alleges that the evidence offered has not been taken into consideration by the courts.

4. He alleges that his right to a fair trial has been violated.

Legal Basis

5. Article 113 (7) of the Constitution, Article 20 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

6. On 20 September 2009, the Applicant filed a Referral with the Constitutional Court. On 28 April 2010, after having considered the Report of the Reporting Judge, Iliriana Islami, the Review Panel, composed of Judges Ivan Čukalovič (Presiding), Enver Hasani and Kadri Kryeziu, made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

7. It appears from the Applicant's submissions that, by judgment P.Nr.236.02 of 31 March 2003, the District Court in Peja convicted the Applicant, together with several other accused persons, on nine accounts of robbery and aggravated theft and sentenced him to 12 years

imprisonment, including the time spent in detention on remand since 5 August 2002.

8. The Applicant appealed against the District Court's judgment to the Supreme Court on "the grounds of essential violation of the provisions of criminal procedure, erroneous and incomplete determination of the facts and violation of criminal law" and proposed that the Supreme Court overturn the appealed judgment and return the case to the court of first instance for retrial or amend the verdict in the way as requested by the defense counsel. He also filed a special appeal on similar grounds.

9. By submission PPA.Nr.494/2003 of 22 December 2003, the Public Prosecutor proposed to the Supreme Court to refuse the appeal as unfounded.

10. On 7 April 2004, the Supreme Court ruled that the appeal of the Applicant was partly founded and re-qualified certain criminal offences, of which the Applicant had been convicted, from "commission of robbery in a group" to "commission of theft".

Applicant's allegations

11. The Applicant alleges that the District Court in Pristina wrongfully convicted him on one account of robbery, for which he got a sentence of 30 months, while that robbery had been committed by the two co-accused and two brothers of one of them. His allegation is apparently supported by a written statement of one of the co-accused, in which the latter declared that the Applicant had not participated in this robbery.

12. The Applicant complains that he has to serve 30 months imprisonment for an offense he has not committed, since the District Prosecutor and other judicial authorities have refused to re-open the case in order to uncover the truth.

Assessment of the admissibility of the Referral

13. In order to be able to adjudicate the Applicant's Referral, the Constitutional Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and the Law.

14. As to the present Referral, the Constitutional Court notes that the Applicant complains of Decision Ap.Nr.495/2003 of the Supreme Court which is dated 7 April 2004. This means that the Referral relates to events prior to 15 June 2008 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 Jasiūnienė v. Lithuania, Application no. 41510/98, ECHR Judgments of 6 March and 6 June 2003).

15. Accordingly, the Applicants' Referral must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously, in its session 18 October 2010:

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr. Iliriana Islami, signed	Prof. Dr. Enver Hasani, signed

Valon Bislimi vs. Ministry of Internal Affairs, Judicial Council of Kosovo and Ministry of Justice

Case KI 06/10, decision of 30 October 2010
Keywords: Individual referral, interim measure, assessment of constitutionality, freedom of movement, judicial protection

The applicant filed a referral before the Constitutional Court, requesting for assessment of Constitutionality of alleged violation of his freedom of movement by restriction of the Ministry of Internal Affairs, and the Municipal Court in Pristina. He claims that such restriction was imposed on him due to the fact that he was not issued a "Certificate that he is not under criminal investigation" which is a document requested by the Ministry of Internal Affairs in order to issue a passport. Such certificate is issued by municipal courts in the area where citizens reside. According to the applicant, the Municipal Court in Pristina has in an incorrect and erroneous manner interpreted legal provisions which foresee that such a restriction for non-issuance of passport can only be applied with a court decision to ban such a thing. He further maintained that his freedom of movement continued to be restricted by the Ministry of Internal Affairs which without legal basis deprives citizens from obtaining passports in case they do not present a "Certificate that they are not under criminal investigation", when in fact pursuant to the Criminal Code this can be done only if the competent court has taken a decision to prohibit such a thing. At the same time, the applicant requested for granting a interim measure in order to avoid further discrimination and violation of citizens' freedom of movement by conditioning such a freedom to a pending criminal case. In relation to imposition of interim measure, the Court decided to reject this request with reasoning that the applicant did not present any evidence which would indicate that he would suffer irrecoverable damage or that imposition of such measure would serve the public interest.

The Constitutional Court decided to find the referral as admissible by considering that the applicant did not have an effective legal remedy through which he would challenge the actions of opposed parties and this was also proven by them at the hearing session. Furthermore the Court found that there was violation of applicant's freedom of movement, because the decision for restrictions imposed on him in the procedure of obtaining the passport were not in line with the Law on Travel Documents which explicitly foresees that the passport may be restricted only in cases when the competent court imposes the measure for non-issuance of the passport, Furthermore, the Court held that such a measure, although it had a legitimate aim, came as a result of an erroneous practice applied by respective institutions against which the applicant had no effective legal remedy.

Pristina, 30 October 2010
Ref. No.: AGJ 63/10

JUDGMENT
In
Case No. KI 06/10
VALON BISLIMI
vs.
Ministry of Internal Affairs, Kosovo Judicial Council
And Ministry of Justice

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

INTRODUCTION

The Applicant

1. The Applicant is Mr Valon Bilsimi, from Pristina. In the proceedings before the Constitutional Court he was represented by Mr Feriz Gërvalla a lawyer from Pristina.

The Opposing Parties

2. The Opposing parties in the procedure before the Constitutional Court are the Ministry of Internal Affairs (MIA), the Kosovo Judicial Council and the Ministry of Justice of the Republic of Kosovo.

3. The Municipal Court in Pristina participated in the procedure before the Constitutional Court and was represented at the public hearing held on 14 July 2010.

Subject matter

4. The subject matter of this Referral is the assessment of the constitutionality of the alleged violation of the Applicant's freedom of

movement as guaranteed by Article 35 (2) of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution). According to the Applicant the right to leave his country has been violated by refusing the issuance of his passport which is required to travel abroad. The Applicant further argued that in the Kosovo legal system there is no effective legal remedy to pursue his right to leave the country.

5. The Applicant through his representative has also submitted a request for interim measures in order to avoid "further discriminations and violations of the right to freedom of movement of citizens with the conditioning of any ongoing criminal procedure."

Legal basis

6. The Referral is based on Articles 113.7 and 116.2 of the Constitution, Articles 20 and 27 of the Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law) and Sections 53 and 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Summary of the facts

7. On 11 November 2004 the Municipal Court in Pristina issued a Decision, No. P. nr. 1341/04, confirming criminal charges against the Applicant and four other persons for the criminal act of aggravated theft prescribed by Article 253(1) 1 of Provisional Criminal Code.

8. Almost four years later in 2008, the Municipal Court in Pristina scheduled three public hearings in the above mentioned criminal case against the Applicant and the others, i.e. on 24 June 2008, 9 July 2008 and 24 July 2008. Notwithstanding the Applicant's presence, all scheduled hearings were adjourned because of the absence of other parties in the proceedings.

9. After July 2008, the Applicant has not received any further summons for the hearing in the above mentioned criminal case.

10. On 27 April 2009 the Applicant submitted a request for issuance of passport to the Department for Document Production of the Kosovo Ministry of Internal Affairs. On the same day the Applicant paid 25 Euro fee for the passport. However, the Applicant did not yet receive his passport nor has he received any written decision rejecting his request for it.

11. On 13 January 2010 the Applicant requested the Municipal Court in Pristina to issue a certificate of not being subjected to investigation in order to receive a passport. He has not received any certificate or decision of the court with regard to non-issuance of the passport. Instead according to the Applicant he received only "verbal rejection" of his request.

12. On 28 May 2010 the Municipal Court in Pristina issued Judgment, No. P. nr. 1341/04, in the case of the Applicant and others and rejected the criminal charges and terminated the criminal procedure against them.

The Applicant's complaints

13. The Applicant complains that his right to freedom of movement as guaranteed by Article 35 (2) of the Constitution has been violated. He argues that the Municipal Court of Pristina unfairly and erroneously interpret the applicable legal provisions failing to provide him with the certificate which, it is alleged, is a necessary document for the Ministry of Internal Affairs to issue any passport of the Republic of Kosovo.

14. The Applicant also complains that there are no legal remedies in Kosovo that can be used to remedy his situation. Therefore according to him there is a need to create mechanisms within the State for the citizens of Kosovo that are in his situation to prevent further violation of the right to be given a passport.

15. The Applicant argues that the his right to freedom of movement has been violated due to the erroneous application of Article 271(2) of the Criminal Procedure Code of Kosovo (CPCK) as well as Article 27.1, item A and Article 28.2 of the Law on Travel Documents. According to the Applicant both laws provide that the limitation of the right to freedom of movement caused by the refusal of the issuance of a passport can only be imposed in cases where a prior decision of the competent court has been issued.

16. The Applicant also argues that the Ministry of Internal Affairs does not have any legal basis to deprive him of his constitutional right based on absence of the certificate issued by the Court that a person is not under investigation. In substance, according to him, the restriction imposed on his right to freedom of movement is not based on law but it is a matter of erroneous interpretation of the laws and practice, including the misinterpretation of a Memorandum of Understanding entered into between the Ministry of Internal Affairs, the Kosovo Judicial Council and the Ministry of Justice, dated 21 August 2008.

17. Finally, the Applicant requested imposition of a interim measure in order "to avoid further discrimination and violations of the right to freedom of movement of citizens with the conditioning of any ongoing criminal procedure."

Opposing Party's comments

18. The Ministry of Justice in its statement to the Court dated 24 March 2010 stated as follows "Although we are signatory parties to the Memorandum of Understanding, pursuant to the provisions of that memorandum, the Ministry of Justice takes no concrete responsibilities in relation to the implementation of Article 27 of the Law on Travel Documents." The statement added that the Ministry of Justice has no competence on intervention in the work of judiciary. The Ministry of Justice confirmed this view at the hearing held on 14 July 2010.

19. The MIA was requested to reply to the Referral but did not submit any written reply. At the hearing held on 14 July 2010 the MIA Representative emphasised that the Memorandum of Understating was signed by them in order to facilitate the process on issuance of the passports. According to the MIA representative there is a legal obligation on the Courts to inform the issuing authority i.e., the MIA in cases in which an individual Decision on refusal of issuance of a passport has been issued. However, they allege that the Courts do not issue Decisions on rejecting the issuance of passports although, it is alleged, they are obliged by the Law and the Memorandum to do that. According to the MIA representative "rejection of issuance of travel document without a court order is not fair."

20. The representative of the MIA also stated that the Municipal Courts should only implement the law, and that the Memorandum should facilitate their work. It was further stated at the hearing that if there is no decision, the Ministry of Internal Affairs should provide passports to applicants.

21. At the public hearing held on 14 July 2010, the representatives of MIA and of Municipal Court in Pristina, clarified the practice based on Memorandum of Understanding as follows: the MIA municipal offices of civil registration compiles the list of persons who have submitted the requests for the passports and send the list to the Court. After receiving a list from MIA, the Court verifies those in their records (i.e. those against whom there are criminal proceedings) and does not issue the certificates to them, while with regard to the persons that are not in the records the Court issues the certificates.

22. The representative of the Kosovo Judicial Council at the public hearing before the Court emphasised that the Courts were bound to enforce Article 18 of the Criminal Procedure Code, quoted below. Article 27 of the Law on Travel Documents provides when a court may disallow issuance of passport. The representative also added that the Kosovo Judicial Council will issue an internal act soon based on the law and the Constitution, requiring the Courts to enforce this law and to issue Decisions on each case, based on the relevant provisions of the law, and then to inform the Ministry of Interior of criminal charges pending, and the cases in which the Court prohibits the issuance of a passport or where it orders the confiscation of the passport.

23. In a letter dated 11 May 2010 from the Municipal Court of Pristina, it was confirmed that in the Applicant's case four hearing sessions were scheduled but were not held because of the absence of some of the accused (but not of the Applicant) and also because of the absence of the injured party. Consequently the proceedings were still ongoing.

24. The Municipal Court further confirmed that with regard to the Applicant's case, "the Municipal Court has not issued and does not issue any special ruling for the non-issuance of the passport, but it issues a ruling in cases when the passport is confiscated". With regard to Article 3 of the Memorandum of Understanding, the Municipal Court stressed "that it implements this agreement by receiving group of referrals of persons that request the issuance of certificates that no criminal proceedings are ongoing." Furthermore it was stated that "In conformity with Article 18 of the CCP the Court does not at all issue certificates that no criminal proceedings are ongoing, when the indictment is in force, as in actual case, and for a criminal offence punishable by a fine or imprisonment of up to three years from the day when the judgement of conviction is rendered."

25. Finally in the same latter it was clarified that "Since in actual case no decision has been issued with regard to the abovementioned, there is no possibility for the appeal."

Proceedings before the Court

26. On 25 January 2010, the Applicant filed a Referral with the Constitutional Court. The President appointed Judge Kadri Kryeziu as Judge Rapporteur and appointed a Review Panel, composed of Judges Ivan Čukalović (Presiding), Enver Hasani and Iliriana Islami.

27. On 19 February 2010 the Review Panel considered the Judge Rapporteur's Report and decided to request additional information in

relation to the Referral from the Ministry of Internal Affairs, the Kosovo Judicial Council and the Ministry of Justice.

28. On 17 March 2010 the Court requested additional information in relation to the Referral from the Applicant.

29. On 28 April 2010 the Review Panel considered the Report of the Judge Rapporteur including the additional information obtained.

30. On 16 June 2010 the full Court deliberated and decided that the Referral is admissible.

31. On 14 July 2010, a public hearing was held at which the Applicant's representative was present as well as representatives of the Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice. A representative of the Municipal Court of Pristina was also present at the hearing.

32. On 22 September 2010 the Court met in private session to deliberate and adopted this judgement.

Relevant legal background

Law on Travel Documents

33. In the Republic of Kosovo the legal rules, procedures and manner of application for issuance of travel documents and their validity is regulated by the Law on Travel Documents (Law No. 2008/03-L037).

34. Article 3 of the Law on Travel Documents defines the Passport, as follows:

"Passport is a travel document which is provided to a Kosova Republic citizen (in further text: citizen) for state border crossing and proving the identity and citizenship."

35. Article 8 of the same Law regulates that the competent organ for issuing the passport is the Ministry of Interior.

36. Article 23 of the Law on Travel Documents further defines that the application for issuance of passport is conducted in a specific form. That form requires the following data (see Art. 23.2):

"a) personal name;
b) personal number of the citizen;

c) date of birth;
d) gender;
e) place of birth;
f) permanent residence;
g) citizenship;
h) date and place of submission of application;
i) name, surname and residence of legal representative.
j) signature of the applicant."

37. Article 26 of the said Law further defines that the Ministry of Interior shall decide on the application for the passport within 15 days after within its submission.

38. Article 27 of the Law on Travel Documents defines situations when the Ministry of Interior shall refuse the application for passport as follows:

"27.1 Competent body, to which was submitted the application for passport, refuses the application on the basis of court decision if:

a) against the citizen who has submitted the application for issuance of passport is conducted criminal procedure respectively procedure for dissolution of marriage and for recognition of parental right, if the court requires prohibition of issuance of passport.

b) there exists the interests of protection of the state, determined by law;

c) to the citizen is pronounced at least twice imprisonment sentence for criminal offences of illegal production and drugs trafficking, money counterfeit, smuggling, falsification of documents, illegal production and weapons and explosives trafficking, illegal border crossing, trafficking in human beings, international terrorism, financing of terrorist activity and other criminal offences regarding the foreign states.

27.2 If the court has brought a final decision against the citizen, based on the points a,b,c of paragraph 1 of this article, it should inform the competent body about the refusal of application and for this it should provide reasoning.

27.3 If any of the reasons from points a, b, c, of paragraph 1 of this article, is presented after the issuance of passport, competent body for issuance of passports should issue decision on taking back the passport.

27.4 Appeal against the decision based on paragraph 3 of this article, does not stop the execution of decision."

39. The Law on Travel Documents further defines that the competent court is obliged to immediately inform the Ministry of Interior if the grounds for refusal of passport ceased (see Art. 28 of the Law).

40. Finally, Article 28(2) of the Law on Travel Documents provides,

"It is considered that there are no reasons for refusal of application for issuance of passport from paragraph 1 of Article 27 of this Law if the competent court, does not renew the prohibition."

Memorandum of Understanding between Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice

41. On 21 August 2008 a Memorandum of Understanding was entered into between the Ministry of Internal Affairs, the Kosovo Judicial Council and the Ministry of Justice intending to establish procedures and responsibilities between those bodies on the implementation of Article 27 of the Law on Travel Documents.

42. Article 2 of the Memorandum prescribes*, inter alia,* that

"Immediately after receiving an application of citizen, the Civil Registry Office of the Municipality shall forward the request to the Municipal Court to determine whether the following is undergoing against the citizen;

Criminal procedure

Marriage settlement procedure

Parental rights recognition procedure

Or, to determine whether an imprisonment sentence has been imposed against the citizen at least twice on …"

43. Article 3 of the aforesaid Memorandum, in the pertinent part, reads:

"The delivery of the names who have applied for a passport should be considered as requirement by the court to express its opinion whether the application of the citizen for the issuance of a passport can be accepted.

In cases where the citizen has not been convicted or a court procedure is not undergoing in line with cases as per Article 2 above, the Court shall sent the response within one working day.

In cases where the citizen has *been convicted or if a court procedure is ongoing in line with Article 2 above, the court shall notify the Ministry of Internal Affairs and the respective citizens on the development of the court procedure and shall inform the decision on granting or rejecting the issuance of the passport to the citizen.*
After taking the decision, the court shall inform the Ministry of Internal Affairs and the citizen in question within 3 working days"

44. The Provisional Criminal Procedure Code of Kosovo adopted on 6 July 2004, as amended on 6 November 2008 by the Criminal Procedure Code of Kosovo, reads as follows:

Article 18

"When it is provided that the initiation of criminal proceedings has the consequence of limiting certain rights, such consequence shall take effect, if it is not determined otherwise by law, upon the entry into force of the indictment and for a criminal offence punishable by a fine or imprisonment of up to three years from the day when the judgment of conviction is rendered, irrespective of whether it is final or not."

Article 271

"The defendant's promise that he will not leave/abandon his residence

(1) The court during the proceedings may require the defendant to promise that he will not hide or change his residence without permission of the court when there is doubt that he has committed a crime and when the court has a reason to doubt that the defendant may hide, go to an unknown place or leave Kosovo.

The promise of the defendant will be noted in the minutes.

(2) The travel document of the defendant, who has given his promise according to paragraph 1 of this article, may be confiscated temporarily. An appeal against the decision to confiscation of travel document does not suspend execution of the decision.

(3) When making his promise, the defendant is warned that in case of violation of the promise, the defendant will be placed into custody. "

Assessment of the Request for Interim Measures

45. The Applicant requested the Court to issue an interim measure in order "to avoid further discrimination and violations of the right to freedom of

movement of citizens with the conditioning of any ongoing criminal procedure."

46. The Applicant has not submitted any evidence that would justify the imposition of such interim measure. He has not proven that the proposed interim measure is necessary to avoid any risk of irreparable damage, or whether such a measure is in the public interest, as required by Article 27 of the Law on the Constitutional Court.

47. It follows that the request must be rejected.

Admissibility

48. In order to be able to adjudicate the Applicants' Referral, the Constitutional Court needs first to examine, whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution.

49. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

"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";

and to Article 47.2 of the Law, stipulating that:

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

50. The Constitutional Court recalls that a similar admissibility criterion is prescribed by Article 35 of the European Convention on Human Rights (the "Convention").

51. According to the well established jurisprudence of the European Court on Human Rights, the Applicants are only required to exhaust domestic remedies that are available and effective. Furthermore, this rule must be applied with some degree of flexibility and without excessive formalism. The European Court on Human Rights further recognized that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the country concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see

European Court on Human Rights judgment in the case Akdivar v. Turkey judgment of 16 September 1996).

52. Moreover, where a suggested remedy did not in fact offer reasonable prospects of success, for example in light of settled domestic case law, the fact that the applicant did not use it is no bar to admissibility (see European Court on Human Rights judgment in the case of Pressos Compania Naviera S.A. v. Belgium of 20 November 1995, para. 27; Radio France c. France, no. 53984/00, decision of 23 September 2003, para 33).

53. According to the case-law of the European Court of Human Rights the administrative authorities form one element of a State that respect_the rule of law and their interests coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose (see, *mutatis mutandis*, Hornsby v. Greece, judgment of 19 March 1997, *Reports* 1997-II, p.511, para. 41).

54. The Constitutional Court has therefore to consider which domestic remedies were available and effective to the Applicant and whether he had exhausted them.

55. The Applicant's representative claims that there are no available and effective domestic remedies that the Applicant could pursue.

56. The Opposing Parties during the public hearing explained the current practice in details but none of them showed that there are remedies that are available to the applicant's situation and that they are effective.

57. In the letter of 11 May 2010 of the Municipal Court of Pristina it was explicitly mentioned that "the Municipal Court has not issued and does not issue any special ruling for the non-issuance of the passport, but it issues a ruling in cases when the passport is confiscated."

58. In the actual case the Municipal Court of Pristina was acting as an administrative body and failed to provide the Applicant with the certificate which, it is alleged, is a necessary document for the Ministry of Internal Affairs to issue any passport of the Republic of Kosovo. This practice is evidently based on the above mentioned Memorandum of Understanding.

59. Indeed, most significantly, the Municipal Court confirmed in their letter of 11 May 2010 that "since in actual [the Applicant's] case no decision has

been issued with regard to the abovementioned, there is no possibility for the appeal."

60. Consequently, taking realistic account not only of the existence of formal remedies in the Kosovo legal system, but also its general legal context and, in particular, the existing practice with regard to the issuance of the passports in Kosovo, the Constitutional Court is of the view that there were no effective remedies at the Applicant's disposal which he could pursue and exhaust.

61. Accordingly, the Referral is admissible.

Merits

i. As regards the Right to Freedom of Movement

62. .At the outset it should be recalled that Article 53 of the Constitution provides as follows:

"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".

63. Article 35 of the Constitution provides as follows:

Article 35 [Freedom of Movement]

1. *Citizens of the Republic of Kosovo and foreigners who are legal residents of Kosovo have the right to move freely throughout the Republic of Kosovo and choose their location of residence.*

2. *Each person has the right to leave the country. Limitations on this right may be regulated by law if they are necessary for legal proceedings, enforcement of a court decision or the performance of a national defense obligation.*

64. Similarly, Article 2 of Protocol No. 4 of the Convention provides as follows:

Freedom of movement

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of order public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

65. The Constitutional Court emphasises that Article 2 of Protocol No. 4 to the Convention guarantees to any person a right to liberty of movement, including the right to leave any country for another country of the person's choice to which he or she may be admitted. The right to leave any country, including one's own, must be read subject to the third paragraph of Article 2, which provides for certain restrictions that may be placed on the exercise of that right in the interests of, *inter alia*, national security or public safety.

Applicable test

66. According to the well established jurisprudence of the European Court of Human Rights the applicable test with regard to the alleged violation of the right to leave any country could be summarized as follows: in order to comply with Article 2 of Protocol No. 4 any restriction must be "in accordance with the law", pursue one or more of the legitimate aims contemplated in paragraph 3 of the same Article and be "necessary in a democratic society" (see European Court on Human Rights judgment in the case Raimondo v. Italy of 22 February 1994, Series A no. 281-A, p. 19, para. 39).

67. This Constitutional Court observes that in the case at issue it was not disputed that there had been interference with the right of the Applicant as guaranteed by Article 35 of the Constitution and Article 2 of Protocol No. 4 to the Convention, by virtue of non issuance of the passport.

Whether the restriction was "in accordance with law"

68. With regard to the lawfulness of the measure, the Court draws attention to the settled case-law of the European Court of Human Rights according to which the expression "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also

refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see Rotaru v. Romania [GC], no. 28341/95, para. 52, ECHR 2000-V). In order for the law to meet the criterion of foreseeability, it must set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons concerned – if need be, with appropriate advice - to regulate their conduct.

69. The Court notes that on 27 April 2009 the Applicant submitted a request for the issuance of a passport to the Department for Document Production of the Kosovo Ministry of Internal Affairs.

70. In accordance with Article 26 of the Law on the Travel Documents the Ministry of Interior was obliged to decide on the Applicant's application for the passport within 15 days after 27 April 2009. However the Ministry failed to do so.

71. The Court further notes that in the Applicant's case the Ministry of Interior effectively prevented the issuance of a passport to the Applicant without either the Ministry of Interior or a Court issuing a decision to that effect.

72. It should be recalled that pursuant to Article 27 on Law on Travel Documents, the competent body i.e. Ministry is entitled to refuse the application for passport *"on the basis of court decision"* and *"if the court requires prohibition of issuance of passport."*

73. The Court recalls that according to the Applicant the restriction imposed on his right of the freedom of movements is not based on law but it is a matter of erroneousness interpretation of the laws and practice based on Memorandum of Understanding between Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice from 21 August 2008.

74. The Court is satisfied that the law in question, i.e. Law on Travel Documents meets the criterion of accessibility and foreseeability, as described in paragraph 68 above.

Whether the restriction pursued a legitimate aim

75. The Court also considers that the imposition of a measure such as that in the instant case in order to ensure the Applicant's presence in the criminal proceedings instituted against him has a legitimate aim.

Whether the restriction was "necessary in a democratic society"

76. With regard to the proportionality of a restriction imposed on account of presence in the criminal procedure, the Court reiterates that it is justified only so long as it furthered the pursued aim.

77. The Court notes the settled jurisprudence of the European Court of Human Rights which states that an imposed measure, while justified at the outset, may become disproportionate and breach that individual's rights if it is automatically extended over a long period (see European Court Human Right judgment in case Luordo v. Italy, no. 32190/96, para. 96,; Földes and Földesné Hajlik v. Hungary, no. 41463/02, para. 35).

78. In any event, the authorities are under an obligation to ensure that a breach of an individual's right to leave his or her country is, from the outset and throughout its duration, justified and proportionate in all the circumstances. They may not extend for long periods measures restricting an individual's freedom of movement without regular re-examination of their justification. Such review should normally be carried out, at least in the final instance, by the courts, since they offer the best guarantees of the independence, impartiality and lawfulness of the procedures. The scope of the review by the Court should enable it to take account of all the factors involved, including those concerning the proportionality of the restrictive measure and the passage of time (see, mutatis mutandis, European Court on Human Rights judgement in the case Le Compte, Van Leuven and De Meyere v. Belgium, 23 June 1981, para 60, Series A no. 43).

79. The Constitutional Court notes that a criminal proceedings against the Applicant was pending before the Municipality Court of Pristina for more than 6 years and that finally the Applicant was acquitted.

80. The Constitutional Court also notes that in the proceedings against the Applicant the Municipal Court has not issued any decision pursuant to Article 271 of the Criminal Code of Procedure. Instead the Court refrained to issue a certificate that was according to the established practice a necessary criterion for issuance of the passport although this document was not listed in Article 23.2. of the Law on the Travel Documents.

81. The Court considers that the scope of the judicial procedure also failed to satisfy the requirements of Article 2 of Protocol No. 4 of the Convention.

82. The Court is also of the opinion that the administrative body did not take account of all the relevant information in order to ensure that the restriction on the applicant's freedom of movement was justified and proportionate in the light of the circumstances of the case.

83. As to whether the authorities fulfilled their duty to re-examine regularly the measures restricting the applicant's freedom of movement, the Constitutional Court notes that no re-examination of the impugned measures was carried out.

84. In view of the foregoing considerations, the Constitutional Court considers that the Applicant was subject to measures of an automatic nature, with no limitation as to their scope or duration (see Riener v. Bulgaria, 23 May 2006, para 127).

85. It concludes that the authorities have failed in their obligation under Article 2 of Protocol No. 4 to the Convention to ensure that any interference with an individual's right to leave his or her country is, from the outset and throughout its duration, justified and proportionate in the light of the circumstances.

86. Accordingly, there has been a violation of the Applicant's right to freedom of movement, guaranteed by Article 35 of the Constitution in conjunction with Article 2 para. 2 of Protocol No. 4 of the Convention.

ii. As regards to the Right to an Effective Legal Remedy

87. Article 54 of the Constitution, entitled Judicial Protection of Rights, reads as follows:

"Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated".

88. Article 13 of the Convention provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

89. The Applicant stated that that there are no available and effective domestic remedies that the he could pursue.

90. The Opposing Parties, as it was already mentioned above, explained the current practice in details but none of them show that there are remedies that are available to the Applicant's situation and that were effective.

91. The Court recalls that according to the case-law of the European Court of Human Rights, Article 13 of the Convention guarantees the availability at (national level of) a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable claim" under the Convention and to grant appropriate relief.

92. The scope of obligation under Article 13 of the Convention varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, European Court on Human Rights judgment in the case Silver and Others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, p. 42, para 113)

93. The rule on exhaustion of remedies is based on the assumption reflected in Article 13 (with which it has a close affinity) that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see the European Court on Human Rights judgment in the case Kudla v. Poland, 26 October 2000).

94. Consequently, where there is an arguable claim that an act of the authorities may infringe the individual's right to leave his or her country, guaranteed by Article 2 of Protocol No. 4 to the Convention, Article 13 of the Convention requires that the legal system must make available to the individual concerned the effective possibility of challenging the measure complained of and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality (see, mutatis mutandis, Shebashov v. Latvia (dec.), 9 November 2000, no. 50065/99 and Al-Nashif v. Bulgaria, no. 50963/99, 20 June 2002).

95. There is no doubt that the Applicant's complaint under Article 2 of Protocol No. 4 to the Convention in respect of the effective prohibition against him leaving Kosovo was arguable. He was entitled, therefore, to an effective complaints procedure in Kosovo law.

96. The Constitutional Court notes that the Opposing Parties signed the Memorandum of Understanding on 21 August 2008, with the purpose of establishing procedures and responsibilities between the Ministry of Internal Affairs, Ministry of Justice and the Kosovo Judicial Council on the implementation of Article 27 of the Law on Travel Documents.

97. The Court emphasises the Memorandum can only facilitate the implementation of the Law and should not in any circumstances be used as an excuse for non-implementation of the Law.

98. The Court recalls that pursuant to practice based on the Memorandum the Applicant's request for the passport was never considered with sufficient procedural safeguards and thoroughness by an appropriate authority.

99. Accordingly the practice based on the Memorandum of Understanding of 21 August 2008, applied by the Ministry of Internal Affairs and Municipal Court prevented the Applicant from enjoying his right to an effective legal remedy in violation of Article 54 of the Constitution in conjunction with Article 13 of the Convention.

FOR THESE REASONS

The Constitutional Court, unanimously in its session of 30 October 2010:

DECIDES

I. REJECTS the request for Interim Measure;

II. DECLARES the Referral as admissible

III. HOLDS that there has been a violation of the Applicant's right to freedom of movement guaranteed by Article 35 (2) of the Constitution in conjunction with Article 2 of Protocol No. 4 to the European Convention on Human Rights;

IV. HOLDS that the practice based on Memorandum of Understanding of 21 August 2008, applied by the Ministry of Internal Affairs and Municipal Court prevents the Applicant in enjoying his right to an effective legal remedy in violation of Article 54 of the Constitution in conjunction with Article 13 of the European Convention on Human Rights;

V. FINDS that the Ministry of Internal Affairs should decide on the Applicant's application for passport of 27 April 2009 in accordance with Law on Travel Documents within 30 days after receipt of this Judgment.

VI. This Judgment shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

VII. The Judgment is effective immediately and it may be subject to editorial revision.

Judge Rapporteur	**President of the Constitutional Court**
Mr. Sc. Kadri Kryeziu , signed	Prof. Dr. Enver Hasani, signed

Ekrem Gashi vs. the Central Bank of the Republic of Kosovo

Case KI 26/09, decision of 14 december 2010
Keywords: individual referral, right to work and exercise of the profession, judicial protection of rights.

The applicant filed a referral against the Central bank of the Republic of Kosovo, as a successor of the Central Banking and Payment Authority of Kosovo (BPAK), which according to him discharged him from work against the law and later on, the employer failed to respect court decisions which were in his favour and which provided that he should be returned to his previous position. However, when BPAK asked a review at the Supreme Court of Kosovo, this court decided in favour of BPAK. The applicant claims that through such actions the right to work and exercise of the profession as well as judicial protection of rights were violated.

The Constitutional Court decided to reject applicant's referral as inadmissible with reasoning that referral is related to a period which dates back from before the entry into force of the Constitution, therefore it emphasises that the referral is time barred and thus inconsistent "*ratione temporis*" with the provisions of the Constitution and the Law.

Pristina, 14 december 2010
Ref. No.:RK 36/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 26/09
Mr. Ekrem Gashi
vs.
Central Bank of the Republic of Kosovo[1]

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

[1] At the time of the events,: its predecessor, the Banking and Payment of Authority of Kosovo(BPAK)

Applicant

1. The Applicant is Mr. Ekrem Gashi, residing in Pristina.

Opposing Party

2. The Responding Party is the Central Bank of the Republic of Kosovo as the legal successor of the Banking and Payment Authority of Kosovo (hereinafter: the "BPAK"), which was the Applicant's employer at the time of the events.

Subject Matter

3. The Applicant complains that he was dismissed by BPAK in violation of the applicable law in Kosovo and did not comply with the decisions of the Courts to reinstate him in his previous employment. He invokes a violation of Articles 49 and 54 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

Legal Basis

4. Article 113 (7) of the Constitution, Articles 20 and 22 (7) and (8) of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2009, (No. 03/L-121), (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. The Referral was registered on 9 July 2009 and communicated to BPAK for comments.

6. On 22 January 2010, BPAK filed a response with this Court.

7. On 15 June 2010, the Review Panel consisting of Judges Kadri Kryeziu (Presiding), Enver Hasani and Iliriana Islami considered the report of the Judge Rapporteur Robert Carolan and made a recommendation to the Court.

Facts

8. The Applicant has worked as a driver for the BPAK, pursuant to an employment contract concluded between the parties on 1 February 2001.

9. On 19 March 2002, the BPAK terminated the Applicant's employment contract, allegedly, for misconduct.

10. On 26 January 2005, the Applicant filed a claim with the Municipal Court in Pristina challenging his dismissal. The Municipal Court found that the termination of the employment contract of the Applicant by the employer had not been conducted in accordance with the applicable law in Kosovo and, therefore, annulled it. Aditionally, the Municipal Court ordered the BPAK to reinstate the Applicant in his job and to compensate the Applicant's litigation expenses in the amount of 639.60 Euro.

11. The Municipal Court found that the employer had violated Article 11 (5) of UNMIK Regulation (2001/27) on Essential Labour Law, (hereinafter "UNMIK Regulation 2001/27"), and concluded that the employer had not reviewed the termination decision as requested by the Applicant, since, pursuant to Article 178 (2) of the Joint Labour Law, the employer should have postponed the termination of the contract of employment, when the Applicant requested the review thereof. In the Municipal Court's view, the Joint Labour Law was the applicable law in Kosovo, in accordance with UNMIK Regulation 1999/24 on the law applicable in Kosovo (hereinafter "UNMIK Regulation 1999/24") as amended by UNMIK Regulation (2000/59).

12. On 10 June 2005, the District Court in Pristina upheld the decision and the legal reasoning of the Municipal Court of Pristina and rejected BPAK's appeal. The District Court found that the Applicant's employment contract had been terminated in contradiction with the Law on Essential Rights of Labor Relation - as the applicable law in Kosovo - since BPAK had held directly a meeting with the Applicant and had communicated to him the grounds for the termination of the employment contract without giving prior notice on the intention and grounds for his dismissal and initiating disciplinary proceedings against the Applicant. BPAK had, therefore, acted in an unlawful manner, in contradiction with the provisions of the above mentioned law.

13. On 6 September 2005, the Municipal Court in Pristina confirmed its decision of 26 January 2005, upheld by the District Court of Pristina on 10 June 2005, and rejected the claim of BPAK that the courts of Kosovo did not have the authority to act upon the Applicant's claim. The Municipal Court of Pristina further concluded that BPAK's appeal to the Supreme Court did not prevent the execution of the decision of 26 January 2005.

14. On 24 January 2006, the Supreme Court of Kosovo allowed the request of BPAK for revision and amended the decisions of the Municipal Court of Pristina and the District Court of Pristina, to the effect that the claim

of the Applicant was rejected as unfounded. The legal reasoning of the Supreme Court was based on the fact that a notification stating the reason for termination of the employment contract to the employee was enough and in accordance with UNMIK Regulation (2001/27), which overruled all legislation that was not in accordance with it.

Applicant's allegations

15. The Applicant claims that BPAK has not re-instated him in his previous employment with BPAK and that BPAK has not compensated him for the 639.60 Euros which the Municipal Court had ordered BPAK to pay to him.[2]

16. The Applicant alleges that his legal right to be re-instated in his previous employment has effectively been denied, because BPAK has not complied with the decisions of the lower courts, which constitutes a violation of Articles 49 [Right to Work and exercise Profession] and 54 [Judicial Protection of Rights] of the Constitution.

- Article 49 provides:

"The right to work is guaranteed."

- Article 54 provides:

"Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated."

Submissions by the Opposing Party

17. In its submissions to the Court, BPAK stated that the Applicant had not been re-instated in his previous position, because his claim was unfounded and legally unsustainable.

18. BPAK maintained that the termination of the Applicant's contract of employment was in compliance with the applicable law of Kosovo. It also alleged that at the time of the termination of the contract of employment, BPAK was exercising a number of responsibilities and functions which

[2] Article 11(5) stipulates that "...if a labour contract is terminated by the employer on the grounds of serious misconduct, the employer shall:
- "notify the employee in writing that it intends to terminate the labour contract. Such notice shall include the grounds for termination; and"
- "a meeting shall be held between the employer and the employee, and at such meeting the employer shall provide the employee with an oral explanation of the grounds for termination, if the employee is a member of a union, the employee shall be entitled to have a union representative present at such meeting."

were the exclusive powers of the Special Representative of the Secretary General, consistent with UNMIK Regulations. It further argued that, as a result, its actions were outside of the authority of the courts of Kosovo.

Assessment of the admissibility of the Referral

19. In order to be able to adjudicate the Applicants' Referral, the Court need first to examine whether the Applicant has fulfilled the admissibility requirements, laid down in the Constitution, the Law and the Rules of Procedure.

20. In this respect, the Court notes that the decision of the Supreme Court was taken on 24 January 2006 and that the Referral was submitted to the Constitutional Court on 9 July 2009.

21. Article 56 of the Law provides:

    "The deadlines defined in this Law for the initiation of procedures on matters that fall under the jurisdiction of the Constitutional Court and which have arisen before the entry into force of this Law shall begin to be counted on the day upon which this Law enters into force."

22. In these circumstances, the Court concludes that the decision of the Supreme Court was taken more than three years before the entry into force of the Law and is, therefore, out of time.

23. It follows that the Applicants' Referral must be rejected as inadmissible "*ratione temporis*"

FOR THESE REASONS

24. The Constitutional Court, pursuant to Article 20 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously, in its session of 14 December 2010:

DECIDES

I. **TO REJECT** the Referral as Inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan, signed	Prof. Dr. Enver Hasani, signed

Halit Bahtiri vs. Directorate of Education of Municipal Assembly in Podujeva

Case KI 35/09, decision of 14 December 2010
Keywords: individual referral, right to work, equality before the law, freedom of movement.

The Applicant submitted a referral requesting compensation for material damages he had suffered since 1981 when the Municipal Council of Communist Party of Podujeva had suspended him from work and had ordered him to work in another primary school with a lower salary. In addition, he alleges that during this time he was maltreated by colleagues and students and thus, was forced to leave his job, what violated his right to work, freedom of movement and he was maltreated.

The Constitutional Court decided to reject the referral as inadmissible with reasoning that applicant had not exhausted legal remedies, even after being clearly instructed by the Kosovo Judicial Council to address to lower courts, and referral was submitted before the deadline foreseen under the law on Constitutional Court.

Pristina, 14 December 2010
Ref. No.: RK 34 /10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 35/09
Applicant:
Halit Bahtiri
vs.
Directorate of Education of the Municipal Assembly in Podujeva

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
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Unanimously approves the following **Decision** on the inadmissibility of the case.

INTRODUCTION

Applicant

1. The Applicant is Mr. Halit Bahtiri, from Sibovc i Epërm village, municipality of Podujeva.

Challenged decisions

Directorate of Education of the Municipal Assembly in Podujeva

Subject matter

2. On 18 August 2009, Mr. Halit Bahtiri, from Sibovc i Epërm village, municipality of Podujeva, filed a referral with the Constitutional Court of Kosovo, which was registered under No. KI 35/09. Mr. Bahtiri requested from this Court that due to the violation of the right to work, freedom of movement and maltreatment, to be compensated 18 years of work experience in the amount of sixty thousand Euros (60,000 €)

Legal basis

3. 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 55 of the Rules of Procedure **of the Constitutional Court** of the Republic of Kosovo (hereinafter referred to as: the Rules).

Summary of the proceedings before the Court

4. The referral was filed with the Constitutional Court on 18 August 2009. The President of the court appointed Prof. Dr. Ivan Čukalović as Judge Rapporteur and the Review Panel comprising of Judge Prof. Dr. Enver Hasani, presiding judge, and Judges Iliriana Islami and M.Sc. Kadri Kryeziu. On 16 June 2010, the Court reviewed the case and discussed on the admissibility of the applicant’s request.

Summary of facts

5. Mr. Bahtiri a graduating student of the Faculty of Philology, Department of Albanian Studies, worked as a professor at “8 November” Classical

Gymnasium in Podujeva, from 1975 to 1977, when he went to serve the army.

6. After the end of the military service and after defending his diploma assignment at the Faculty of Philology, in 1978, Mr. Bahtiri established employment relations as a professor at “8 November” Classical Gymnasium in Podujeva.

7. In 1981, the municipal council of the Communist Party of Pudujeva and the Initiation Council of the Municipal Assembly of Podujeva suspended the applicant and ordered him to work at “Vëllazërim-Bashkim” [Brotherhood-Unity] Primary School in Podujeva, whereby, as the applicant alleges, because of the difference in payment, he was damaged in the amount of **forty-five thousand five hundred Euros (45,500 €) German Marks**. In addition, according to the applicant, he was maltreated during all the time by colleagues and students and, as a result, he was forced to leave his job in 1990.

8. On 16 July 2007, Mr. Bahtiri addressed the Directorate of Education of the Municipal Assembly in Podujeva with the request to be reinstated to the working position at “Aleksandër Xhuvani” Gymnasium in Podujeva or at “Naim Frashëri” Primary School in Podujeva.

9. On 21 January 2008, Mr. Bahtiri addressed the Ministry of Education, Science and Technology of the Republic of Kosovo with the request to be recognized 17 years of work experience and to be paid fifty thousand Euros (50,000 €) as compensation.

10. On 30 October 2007, Mr. Bahtiri addressed Kosovo Judicial Council with the request for the compensation of the income in the amount of thirty-five thousand Euros (35,000 €).

11. Kosovo Judicial Council replied to Mr. Bahtiri’s request on 21 November 2007 and instructed him to address the municipal competent court with a claim for the compensation of his income to realize his right.

12. Mr. Bahtiri also addressed the Independent Supervisory Council of Kosovo requesting to be reinstated to the working position at “Naim Frashëri” Primary School.

13. The Independent Supervisory Council of Kosovo, through the document No. 02 (20) 2008, dated 30 January 2008, rejected Mr. Bahtiri’s request reasoning that the appeal is inadmissible since, pursuant to Article 2, paragraph 2.1 of Administrative Instruction of the Ministry of Public Services on Rules of Procedure for Appeals, only civil service employees

are entitled to file appeals with the Independent Supervisory Council of Kosovo, whereas the applicant has neither the status nor the post of the civil servant, so, according to Article 11, paragraph 11.1 of UNMIK Regulation No. 2001/36 on Civil Service of Kosovo and Article 2.1 of Administrative Instruction of the Ministry of Public Services No. 2005/02 on the Rules of Procedure for Appeals, this appeal has been lodged by the unauthorized person.

Applicant's allegations

14. The Applicants claims that the has been denied the right to work according to Article 49 of the Constitution and that he has been discriminated against according to Article 24 (2) of the Constitution, without elaborating the issue any further.

Assessment of admissibility of the referral

15. In order to be able to adjudicate the applicant's referral, the Court needs first to examine the documents available to it and then to analyze if the applicant has fulfilled the admissibility requirements laid down in the Constitution. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

    "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."

16. Based on the documents submitted by Mr. Bahtiri, the Court finds that despite the legal instruction of the Kosovo Judicial Council, dated 21 November 2007, that he can address the municipal competent court with a claim for the compensation of his income to realize his right, Mr. Bahtiri has not used this legal right.

17. The Court also emphasizes that domestic legislation, especially the Law on Contested Procedure (Law No. 03/L-006 of the Assembly of the Republic of Kosovo) provides that regular courts are competent to adjudicate on labor relations disputes and it also provides effective appeal remedies for the realization of the rights that are supposed to have been violated.

18. Moreover, Article 475 of this Law provides that "In contentious procedures in work environment, especially is setting the deadlines and court sessions, the court will always have in mind that these cases need to be solved as soon as possible."

19. Considering what was said above, the Court assesses that Mr. Bahtiri has in no case addressed a competent court to decide regarding the referral he filed with the Constitutional Court

20. The Court wishes to emphasise that the rationale of the rule for the exhaustion of legal remedies is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. This rule is based on the assumption that the legal order of the Republic of Kosovo will provide effective legal remedies for the protection of the violation of constitutional rights (see, *mutatis mutandis*, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999).

21. The Court also emphasizes simply that any doubt regarding the perspective of the issue is not sufficient to exclude one complainant from his obligation to appeal to local competent authorities (see Whiteside v the United Kingdom, Decision of 7 March 1994, App. No. 20357/92, DR 76, p. 80).

22. Article 56 of the Law provides:

    "The deadlines defined in this Law for the initiation of procedures on matters that fall under the jurisdiction of the Constitutional Court and which have arisen before the entry into force of this Law shall begin to be counted on the day upon which this Law enters into force."

23. Article 56 of the Law interconnects with Article 49 of the Law, which provides deadlines for the submission of individual referral pursuant to Article 113 (7) of the Constitution and Article 47 of the Law:

    "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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced."

24. In relation to this, the Court notes that the applicant's referral was filed with the Constitutional Court on 18 August 2009, whereas the last decision in relation to this case is the Independent Supervisory Council's decision, dated 30 January 2008, which relates to a period prior to the date of the entry into force of the Constitution (see Blečić v. Croatia, Application No. 59532/00, ECHR Judgment of 29 July 2004) and, therefore, concludes that the referral is out of time.

25. Article 48 of the law 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."

26. The applicant has not accurately defined what rights and freedoms he claims to have been violated according to the Constitution.

FOR THESE REASONS

The Court after considering all the facts and evidence presented by the applicant, and after having deliberated on the matter, pursuant to Article 113 (7) of the Constitution, Article 20 of the Law, and Article 55 of the Rules of Procedure, unanimously, in its session of 14 December 2010:

DECIDES

I. **TO REJECT** the referral as inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Prof. Dr. Ivan Čukalović, signed	Prof. Dr. Enver Hasani, signed

Veli Sermaxhaj vs. Decision E. No. 299/05, P. Nr .772/05 and Ed .No .44/09 of Municipal Court in Gjilan

Case KI 49/09, decision of 14 December 2010
Keywords: individual referral, Constitutionality, Constitutional rights, property

Applicant submitted a referral to Constitutional Court alleging that decisions of Municipal Court in Gjilan, taken by the same judge in civil and criminal proceedings are not consistent with one another and expert and prosecutor were partial in performing their duties. Applicant alleges that his constitutional rights were violated, not specifying accurately what provisions of the Constitution are violated.

The Constitutional Court decided to reject applicant's referral as inadmissible, with reasoning that applicant did not provide any evidence that he has appealed against stated decisions to any court of higher instance, therefore he has not exhausted legal remedies foreseen under the law.

Pristina, 14 December 2010
Ref. No.: RK71/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 49/09
Applicant
Veli Sermaxhaj

CONSTITUTIONAL REVIEW
of
Decision of the Municipal Court of Gjilan, E.no. 299/05, dated 26 May 2005
and
Decision of the Municipal Court of Gjilan, P.no. 772/05, dated 26 March 2009
and
Decision of the Municipal Court of Gjilan, Ed.no. 44/09, dated 25 November 2009

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

Applicant

1. The Applicant is Mr. Veli Sermaxhaj residing in Gjilan.

Challenged decisions

2. The challenged decisions are:

   a. the civil case decision of the Municipal Court of Gjilan, E.no. 299/05 of 26 May 2005, which was served on the Applicant on 4 July 2005;

   b. the criminal case decision of the Municipal Court of Gjilan, P.no. 772/05 of 26 March 2009, which was served on the Applicant on 7 April 2009; and

   c. the execution decision of the Municipal Court of Gjilan, Ed.no. 44/09 of 25 November 2009, which was served on the Applicant on 26 November 2009.

Subject matter

3. The Applicant claim that the expert appointed by the Municipal Court of Gjilan for the evaluation of the property had abused his official duty and that he has requested the Municipal Court to apply Articles 30 [Application of General Provisions on Criminal Liability], 39.3 [Punishment of Fine], 43.2 [Suspended Sentence] of the Provisional Criminal Code of Kosovo Regulation 2003/25 (hereinafter: the "PCCK"). Further, he alleges that the Prosecutor, who is a friend of a third party had threatened him with imprisonment and liquidation if the Applicant did not pay his debt to the third party.

4. The Applicant does not invoke any Article of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

Legal basis

5. Article 113.7 of the Constitution, Article 22 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

6. On 5 October 2009, the Applicant submitted a referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

7. On 22 October 2009, the Court sent a letter to the Applicant notifying him that he had to fill out the Application form in order to file a Referral with the Court.

8. On 3 November 2009, the Applicant submitted the Referral to the Court.

9. On 15 November 2009, the Applicant filed an additional submission with the Court stating that the expert appointed by the Municipal Court of Gjilan for the evaluation of the property had abused his official duty.

10. On 18 February 2010, the Secretariat communicated the Referral to the Municipal Court of Gjilan, which submitted its reply on 9 March 2010, providing the Court with a chronological history of the civil and criminal cases. The Municipal Court specified that, in its opinion, no rights of the Applicant had been violated and that he had participated in every court session and had had the right to appeal against each judgment.

11. On 13 December 2010, the Review Panel, consisting of Deputy President Kadri Kryeziu (Presiding), and President Enver Hasani and Judge Iliriana Islami, considered the Report of the Judge Rapporteur Snezhana Botusharova and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

12. In his Referral, the Applicant complains about courts decisions taken in two different civil cases and in one criminal case.

As to the civil proceedings

13. The first civil case concerned a debt of the Applicant's company ("NPT Vlora VS") owed to the "Banka Kreditore Sh.a." in Pristina (hereinafter: the "Creditor").

14. On 25 April 2005, the Creditor submitted to the Municipal Court of Gjilan a request for execution with sequestration and confiscation of the collateral and sale of immovable property, since the Applicant had failed to fulfill his obligations under the loan agreement concluded on 9 March 2004.

15. On 26 May 2005, the Municipal Court allowed the execution of the Creditor's request (Decision E.no. 299/05). The Applicant did not submitt an appeal against this decision.

16. On 6 September 2005 the Municipal Court of Gjilan suspended the execution procedure, since the Applicant and the Creditor had entered into a court settlement.

17. On 9 May 2006, the Creditor filed a request for execution with the court, claiming that the Applicant had not fulfilled his obligation in accordance with the court settlement.

18. On 12 December 2006, the Municipal Court of Gjilan estimated the market value of the property of the Applicant, based on an evaluation made by a financial expert appointed by the court.

19. The Applicant appealed against this judgment to the District Court of Gjilan, which, on 14 February 2007, rejected the appeal as unfounded and upheld the judgment of the Municipal Court.

20. On 21 June 2007, the Municipal Court of Gjilan withdrew its decision of 28 May 2007, by which it had postponed the sale of the property for a further 6 months, at the request of the Creditor for the return to the previous state. None of the parties appealed against this Judgment.

21. On 10 August 2007, the Municipal Court decided on the best offer made for the property. The Applicant appealed against the judgment to the District Court of Gjilan, which, on 2 October 2007, declared the appeal unfounded and upheld the judgment of the Municipal Court of Gjilan.

22. Thereupon, the Applicant submitted a request for revision against the District Court's ruling to the Municipal Court of Gjilan, which, on 14 November 2007, dismissed the request as inadmissible. The Applicant did not appeal against this Judgment.

23. The Applicant then challenged the decision on execution and evaluation of the property before the Municipal Court, which, on 17 December 2007, rejected also this claim as unfounded.

24. On 25 February 2009, the Applicant submitted a request for retrial to the Municipal Court of Gjilan, which, however, rejected it. The Applicant did not appeal this decision.

25. On 8 May 2009, the Municipal Court of Gjilan ruled that the sale of the property is invalid because the buyer did not pay the amount within the legal time limit. This decision was not appealed.

26. On 26 August 2009, the Municipal Court of Gjilan issued decision E.no. 299/05, 651/06 and 920/2007 to determine the expertise in evaluating the mortgaged immovable property, while in accordance with the Court Conclusion of 1 February 2010, the mortgaged property value was determined through a decision acknowleged by all parties in procedure and now awaits the publication of the auction for selling the mortgaged property in order of meeting the creditor's request for debt repayment.

27. In the second civil case concerning the payment by the Applicant of a debt to a third person, the Municipal Court of Gjilan ruled, on 5 October 2005, that the Applicant had to pay this debt to that person. The Applicant did not appeal against this decision.

As to the criminal proceedings

28. On 12 June 2003, the Applicant entered into a loan agreement.

29. On 3 February 2009, the Applicant was summoned to appear at a hearing on 10 March 2009, being accused of having committed fraud, pursuant to Article 261 (1) of the Criminal Code of Kosovo.

30. However, without informing the court, the Applicant did not attend the hearing, which was then postponed until 26 March 2009.

31. At the hearing of 26 March 2009 the Applicant admitted his guilt and was, consequently, convicted for fraud and sentenced to three months imprisonment which would not be executed if within one year does not committ a criminal act (Decision P.no. 772/05).

32. Thereupon the Prosecutor appealed against this judgment to the District Court of Gjilan, stating that the Municipal Court should have imposed a harsher sentence.

33. On 16 June 2009, the District Court of Gjilan sentenced the Applicant to three months of imprisonment.

As to the execution of decision P.no. 772/05

34. On 27 July 2009, the Municipal Court of Gjilan approved the request of the Applicant to postpone the sentence.

35. On 23 October 2009, the Municipal Court of Gjilan rejected a further request of the Applicant to postpone the carrying out of the sentence as unfounded. The Applicant appealed this decision to the District Court of which rejected the appeal as unfounded.

36. On 25 November 2009, the Municipal Court rejected the Applicant's request to replace the sentence by a fine as unfounded (Decision Ed.no. 44/09).

37. The Applicant appealed the decision of the Municipal Court of Gjilan to the District Court of Gjilan, which, on 10 December 2009 rejected the appeal as unfounded.

Applicant's allegations

38. The Applicant alleges that the decisions of the regular courts were not consistent and that the appointed expert as well as the prosecutor were biased. Moreover, the courts did not allow him to properly present his case at the oral hearings, nor to be represented by a lawyer.

39. Finally, he complains that all cases before the Municipal Court in Gjilan were handled by the same judge.

Assessment of the admissibility of the Referral

40. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

41. Article 113.7 of the Constitution states:

"Individual persons 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.

42. 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, invoked by the Applicant before those instances. The rule is

based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). 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 is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).

43. This Court applied the same reasoning when it issued Resolution on Inadmissibility in the case of AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Case KI 41/09 of 27 January 2010, and in the Resolution on Inadmissibility in the case of Mimoza Kusari-Lila vs. The Central Election Commission, Case No. KI 73/09 of 23 March 2010.

44. It is clear from the Applicant's submissions that he never raised or pursued the alleged violations before the higher instance courts, including the Supreme Court of the Republic of Kosovo.

45. It follows that the Applicant has in the civil, criminal and execution proceedings not exhausted all legal remedies available to him under applicable law as required by Article 113.7 of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, 47 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously, in its session of 14 December 2010:

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova, signed	Prof. Dr. Enver Hasani, signed

Nexhmedin Llumnica vs. Vendimit C1. Nr. 618/02 of Municipal Court of Pristina

Case KI 03/09, decision of 14 December 2010
Keywords: individual referral, right to property.

Applicant submitted a referral challenging the Decision of Municipal Court, which had claimed not to have jurisdiction to annul a decision for expropriation of their property, alleging that this denied his right to property. He requests from the Constitutional Court to suspend all economic activities of the company that was constructing in the property, which he claims was forced to sell to that company, which later accused him for not fulfilling the terms of contract.

Constitutional Court decided to reject applicant's referral as inadmissible with reasoning that applicant did not provide any *prima facie* evidence to support the claim for violation of his constitutional rights.

Pristina, 14 December 2010
Ref.No.: RK 41/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 03/09
Nexhmedin Llumnica
vs.
Decision C1.nr.618/02 of the Municipal Court of Pristina

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
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Unanimously adopts the following resolution on inadmissibility.

The Applicant

1. The Applicant is Nexhmedin Llumnica who resides in Pristina.

The Challenged Decision

2. Decision C1.nr.618/02of the Municipal Court of Pristina of 11 August 2008.

Subject Matter

3. The Applicant argues that his rights guaranteed by Article 46 (Protection of Property) of the Constitution of the Republic of Kosovo have been violated. He requests that the Court: (1) Suspend all economic activities of Melrose Investment Group in Kosovo; and (2) Award 800 million Euro as compensation for the violation.

Legal Basis

4. Art. 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of 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 Constitutional Court

5. On 18 February 2009, the Applicant filed his referral with the Constitutional Court.

6. On 23 February 2009, the Interim Secretary of the Constitutional Court informed the Applicant that the Court had received and registered his request, and would review it as soon as the Court obtained complete functionality.

7. On 3 October 2009, the President of the Constitutional Court appointed Prof. Dr. Ivan Čukalović as Judge Rapporteur.

8. On 15 December 2009, the President of the Constitutional Court established the review panel in the composition of Judge Robert Carolan, Presiding, and Judges Altay Suroy and Snezhana Botusharova.

The Facts

9. The Applicant argues that he was the co-owner, along with Riza Llumnica, of the cadastral plot 2653/11656/3, registered on possession list no. 2265 in MA Pristina.

10. On 25 November 1974, the Secretariat for Economy and Finance of MA Pristina expropriated cadastral plot 2653/11656/3, registered in the name of Hysen Bajram Llumnica. None of the property owners opposed the decision and the Secretariat offered them land plots in other locations as compensation. (Decision No. 05-464-74 of 25.03.1974).

11. In 1998, the Applicant submitted a request for the de-expropriation of the above property to the Directorate for Property and Legal Matters of the Municipality of Pristina. Upon receipt, the Directorate informed the Applicant that he had to include the expropriation decision with his request.

12. On 10 May 2001, the Applicant and Riza Llumnica submitted a request to the Directorate for Property and Legal Matters of the Municipality of Pristina to request the de-expropriation of the above property.

13. On 03.10.2002, the Applicant and Riza Llumnica filed proceedings with the Municipal Court of Pristina, requesting acknowledgment of their property rights over cadastral plot 2653/3.

14. On 08 May 2003, the Applicant and others entered into a business contract with the "Melrose Investment Group" from Tirana. According to the terms of the contract, the Applicant and his partners were to sell the cadastral plot 2653/3 to the Melrose Investment Group in exchange for three apartments.

15. Sometime later, Melrose Investment Group issued proceedings for breach of contract alleging that the Applicant had failed to fulfill the provisions of the contract regarding the certification of property rights.

16. On 11 August 2008, the Municipal Court of Pristina found that it had absolutely no jurisdiction to deal with the matter because only the body that adopted the initial expropriation decision is competent to annul the decision. (C1.nr.618/02).

Assessment of Admissibility of the Referral

17. Article 113.7 of the Constitution states:

    Individual persons 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. Article 48 of the Law states:

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 Applicant has not submitted any prima facie evidence indicating a violation of his rights under the Constitution (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005). The Applicant does not specify how the Constitution supports his claim, as required by Article 113.7 of the Constitution and Article 48 of the Law. Thus, the referral must be rejected as manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law, and Section 54(b) of the Rules of Procedures, unanimously, in its session of 14 December 2010:

DECIDES

I. **To REJECT** this Referral as inadmissible.

II. The Secretariat shall notify the Parties of the Decision and shall publish it in the Official Gazette in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalovič, signed	Prof. Dr. Enver Hasani, signed

Kimete Bikliqi vs. The Central Election Commission

Case .KI. 09/10, decision of 14 December 2010
Keywords: individual referral, freedom of election and participation.

The Applicant has submitted a referral whereby she alleges that the CEC interfered unlawfully with the votes assigned to her in the local elections, and as a result of this she lost her position as member of the Municipal Assembly. She alleges that even after the complaints to the Election Commission on Appeals and Complaints (ECAC) and Supreme Court, which have been rejected, her freedom to election and participation have been violated.

The Constitutional Court decided that referral is admissible due to the fact that the Applicant exhausted legal remedies available and submitted the referral within the legal deadline foreseen under the law. However, after analyzing the Law on Elections in relation with the Constitution, the Court decided that there have been no violation of the constitutional rights of the Applicant.

Pristina: 14 December 2010
Ref. No.: AGJ 67/10

JUDGMENT
in
Case No. KI. 09/10
Applicant
Kimete Bikliqi
vs.
The Central Election Commission

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
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Adopts the following Judgment:

Applicant

1. The Applicant is Ms. Kimete Bikliqi from Janjevo, Lipjan.

Opposing party

2. The Central Election Commission (CEC), established pursuant to Article 139 of the Constitution of the Republic of Kosovo.

Subject matter

3. On 27 January 2010, Ms. Kimete Bikliqi filed a Referral with the Constitutional Court of Kosovo, which was registered under No. KI-09/10. The Applicant challenged the decision of Central Election Commission (CAC), dated 14 December 2009, on the announcement of local election results that were held on 15 November 2009. In particular, the Applicant alleges that the following provisions were violated: Article 45, paragraph 2 of the Constitution of the Republic of Kosovo, Article 232, paragraph (c) and (g) of the Law on Contested Procedure of Kosovo, and Article 106 and 117 of the Law on General Elections in Kosovo.

Legal basis

4. Article 113 of the Constitution of the Republic of Kosovo (hereinafter: 'the Constitution'); Article. 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter 'the Law'), and Section 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter 'the Rules of Procedure').

Summary of proceedings before the Constitutional Court

5. The Referral was filed with the Constitutional Court on 27 January 2010. The President of the Court appointed Prof. Dr. Ivan Cukalović as Judge Rapporteur, and Review Panel composed of Judge Mr. Kadri Kryeziu, presiding, Prof. Dr. Enver Hasani and Dr. Iliriana Islami. The Court reviewed the admissibility of the applicant's referral.

Facts

6. The Applicant, who was a candidate for the Municipal Assembly in Lipjan during the local elections held on 15 November 2009, alleges that the CEC interfered unlawfully with the votes assigned to her in the Local Elections held on. According to the preliminary results announced by the CEC, the Applicant had won 132 votes, and in being listed as candidate number eighteen in the list of candidates from the Democratic Party of

Kosovo she, according to that result, had secured the position of Municipal Assembly member in Lipjan.

7. Following the completion of the entire process and the publication of the final election results by the CEC on 14 December 2009, and pursuant to Article 106 paragraph 3 of the Law on General Elections, it appeared that the Applicant had a total of 131 votes and as a result the position of member in the Municipal Assembly was allocated to another person who had won the same number of votes, 131, but who was ranked higher in the list of candidates for the Democratic Party of Kosovo, the Applicant's party.

8. On 16 December 2009 the Applicant filed a complaint with the Election Commission on Appeals and Complaints (ECAC), expressing her concern over her exclusion from the final results list published by the CEC on 15 December 2009, and requesting the correction and confirmation of her votes. On 21 December 2009, the ECAC issued Decision A.no.477/200 through which it rejected the complaint as ungrounded.

9. On 11 January 2010, Ms. Bikliqi filed an appeal in writing to the ECAC together with new evidence and requested the review of the ECAC Decision A.nr.477/2009, dated 21 December 2009. On 21 January 2010, the ECAC issued Decision A.no.06/2010 through which it rejected the appeal as ungrounded.

10. On 21 December 2009, Ms. Bikliqi lodged an appeal with the Supreme Court of Kosovo against the ECAC Decision A.no.477/2009. The Supreme Court of Kosovo, in its Judgment A.no.995/2009, dated 29 December 2009, stated that: "upon assessing the appeal allegations and all case files related to this issue, found that the appeal is unfounded". In the same decision the Supreme Court stipulated that: "the CEC, upon concluding all procedures in voting centres and counting centres, and after being informed that the ECAC has decided on all remarks pertaining to voting and counting, certified the final results of elections on 14 December 2009, at 18:45. Provisions of Article 119.3 of the Law on General Elections in Kosovo (LGEK) foresee that CEC decisions may only be appealed, if such decisions impact on legal rights, which are listed under that article. Incompliance of preliminary results with final results is not listed as one of the reasons for appealing against CEC decisions, therefore the appeal of the applicant was inadmissible, according to the Court's assessment, the respondent has justly applied the Article 118 of the LGEK when deciding as in the ruling of its decision".

Assessment of the Admissibility of the Referral

11. In order to be able to adjudicate the Applicants' Referral, the Court examined the documentation available and examined whether the

Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this respect, the Court refers to Article 113.7 of the Constitution:

"*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.*"

12. From the documentation filed the Court concludes that the Applicant has exhausted all legal remedies provided by law in that she had a final Appeal rejected by the Supreme Court.

13. Article 48 of the Law provides that:

"*In his/her referral, the Applicant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challe*nge."

14. The Applicant alleges that her rights provided by Article 45 of the Constitution, Articles 106 and 107 of the Law no.03/L-073 on General Elections and Article 232 (c, g) of the Law on Contested Procedure 03/L-006 have been violated.

15. Article 49 of the Law 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force.*"

16. The Applicant's Referral was lodged with the Constitutional Court on 27 January 2010, whereas the latest Decision in relation to the present case is that issued by the Supreme Court of Kosovo, dated 29 December 2009. Thus the Court concludes that the Referral is filed in compliance with Article 49 of the Law.

17. Therefore, the Constitutional Court concludes that the legal criteria have been fulfilled and the Referral is admissible.

Elections

18. In a previous case of Ms. Mimoza Kusari, KI- 73/09, published on 18 March 2010, the Constitutional Court referred to the importance of

elections in a democratic society. It is worth repeating and emphasising in this Judgment some important aspects that this Court pointed out in that case.

19. *" 20. Article 45 of the Constitution of Kosovo provides:*

20. *Article 45 [Freedom of Election and Participation]*

    1. Every citizen of the Republic of Kosovo, who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.

    2. The vote is personal, equal, free and secret.

    3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies.

21. *Pursuant to Article 22 of the Constitution of Kosovo, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols are directly applicable in the Republic of Kosovo. These constitute a part of National Law. Article 3 of Protocol 1 provides the right to free elections. It provides that elections shall be held "at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".*

22. *Article 123.2 of the Constitution of the Republic of Kosovo provides that: "local self-government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections." The Assembly of Kosovo ensured the mechanism for holding General and Local Election through the adoption of the Law no.03/L-073 on General Elections in the Republic of Kosovo and the Law no.03/L-040 on Local Elections in the Republic of Kosovo.*

23. *The European Court of Human Rights (ECHR) stressed that the right to vote is an active right and the right to be elected is a passive right. The applicant alleges that her right to be elected has been violated. Nevertheless, there is a difference between the right to be elected and the right to stand for elections. The ECHR case-law shows that there is a considerable freedom of action that the States enjoy in relation to their electoral system and that they have a wide margin of appreciation for the way the elections were conducted and how election results are announced. In the case of United Communist Party of Turkey vs. Turkey, the Court stressed that: "the (States) have a wide margin of*

appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate" (see Sadek and Others (no.2) vs. Turkey, no.25144/94 et al, 31, ECHR 2002-IV).

24. *The ECHR continuously stressed the importance of free and democratic elections in its Decisions. In the same Decision, the Court expressed its opinion in the following way: "Democracy is viewed as the only political model envisaged by the Convention and in compliance with the circumstances, the only that complies with it." In the same Decision, the ECHR quoted the Code of Good Practice, adopted by the European Commission on Democracy Through Law (The Venice Commission) in the 51 (Instructions) and 52 (Report) sessions on 5-6 July and 18-19 October 2002 (Opinion no.190/2002, CDL-AD(2002) 23 rev). The Venice Commission stated that:*

    "The five principles underlying Europe's electoral heritage are universal, equal, free, secret and direct suffrage. Furthermore, elections must be held at regular intervals."

25. *The Venice Commission also underlines that the organisation of elections must be monitored by an impartial body, responsible for the application of the electoral law and that there must be an effective system of appeal in place. According to the law in Kosovo, these two functions are performed by the CEC and the ECAC respectively by the courts, as provided by law. These are permanent and impartial bodies that decide about all matters related to elections, certification of results and the appeals related to the election process, as provided by law and electoral regulations.*

26. *The reasoning that the CEC and the ECAC has that authority is based on the assumption that there must be certainty for the election process. The need for certainty requires the annulment of elections only in case of serious violations and the burden of proof lies with those alleging such violations."*

The Law on Elections in Kosovo

21. The law in relation to the conduct of elections in the Republic of Kosovo is governed by Law 03/L-073, the Law on General Elections in the Republic of Kosovo and Law No. 03/L-072, the Law on Local Elections

in the Republic Of Kosovo. Article 26 of the Law on Local Elections provides:

Article 26

Chapter XVI (The counting of ballots and announcement of election results), and any provision relating to the subject matter thereof, of the Law on General Elections in the Republic of Kosovo shall mutatis mutandis apply to local elections unless otherwise provided by this Law.

22. Article 101 of the Law on General Elections provides general provisions for the counting of ballots and the announcement of election results and it gives power to the CEC to make Rules accordingly. It states as follows:

Article 101
General Provisions

101.1 The procedures of counting of the ballots shall be governed by the following objectives: accuracy, transparency, efficiency, capability for recount and repeat elections, and protection of the secrecy of the vote.

101.2 Regular ballots cast at Polling Stations within Kosovo will be counted at those Polling Stations immediately after the close of voting.

101.3 The counting procedures shall be in accordance with the CEC rules.

23. The CEC has made Rules governing many aspects of elections. The first of these was Electoral Rule Nr. 01/2008, On Registration and Operation of Political Parties which entered into force on 29 June 2009. The most recent was Electoral Nr. 15/2010 concerning Early Elections and Extraordinary Elections which entered into force on 2 March 2010.

24. The most relevant of the Rules made in relation to this case is Electoral Rule Nr. 09/2009 on Polling and Counting Inside Polling Stations on Municipal Election Commission Level, which entered into force on 25 June 2009. These Rules govern the processes for the counting of ballots and for the counting and reconciliation of conditional ballots. The ECAC determines complaints in relation to the polling process. The Applicant appealed to the ECAC in relation to her complaint and her complaint was rejected by the ECAC and subsequently by the Supreme Court. The Applicant has not been able to substantiate where in the entire process

there was a violation of the Law or the Rules that affected her constitutional rights.

25. The Court takes this opportunity to repeat the provisions of Article 53 of the Constitution which obliges the Court to interpret human rights and fundamental freedoms in a manner consistent with the decisions of the ECHR. That Article provides as follows:

Article 53 [Interpretation of Human Rights Provisions]

Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.

26. In the case of Mathieu-Mohin and Clerfayt vs. Belgium, Application no. 9267/81, the ECHR stressed that, “the Contracting States to the European Convention on Human Rights have a wide margin of appreciation, given that their legislation on the matter varies from place to place and from time to time. Electoral systems seek to fulfill objectives which are sometimes scarcely compatible with each other: on the one hand, to reflect fairly faithfully the opinions of the people, and on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. In these circumstances the phrase "conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" implies essentially - apart from freedom of expression (already protected under Article 10 of the Convention) - the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election”.

27. In the same Decision, the ECHR stated: ‘It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate "wasted votes".’

28. The European Court of Human Rights pointed out that “in any consideration of the electoral system in issue, its general context must not be forgotten. The system does not appear unreasonable if regard is had to the intentions it reflects and to the respondent State’s margin of appreciation within the Belgian parliamentary system - a margin that is all the greater as the system is incomplete and provisional”.

29. The ECHR ultimately decided in that case that there was not a disproportionate limitation such as would thwart "the free expression of the opinion of the people in the choice of the legislature".

30. The role of the Constitutional Court in the election process is recognized by the Law on General Elections, and Article 106.1 provides that the CEC shall certify the election results when all outstanding complaints concerning polling and counting have been adjudicated by the ECAC and by the Constitutional Court. The Court has no other role in the election process other than to adjudicate on the issue as to whether there has been a violation of individual rights and freedoms guaranteed by the Constitution. In the present case the Applicant has not been able to substantiate where in the entire process there was a violation of the Law or the Rules that affected her constitutional rights.

31. 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).

32. Bearing in mind that that the Republic of Kosovo has a wide margin or appreciation in the manner by which, through its laws, it provides for the holding of fair and free elections and bearing in mind that the Applicant has not been able to point to a breach of the law or of the Constitution that affects her constitutional rights the Court therefore concludes that there has been no violation of her rights.

FOR THESE REASONS

Pursuant to Article 113 (7) of the Constitution, Article 20 of the Law and Section 55 of the Rules of Procedure, the Constitutional Court by a majority, in its session on 14 December 2010:

DECIDES

I. The Referral is Admissible.

II. There is no violations of the rights as alleged by the Applicant.

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	**President of the Constitutional Court**
Prof. Dr. Ivan Čukalović, signed	Prof. Dr. Enver Hasani, signed

Idriz Ratkoceri vs. Judgment of the Municipal Court of Pristina, P. 1216/2004

Case KI 67/09, decision of 14 December 2010
Keywords: individual referral, assessment of the constitutionality,

The Applicant has submitted a referral to assess the constitutionality of the Judgment of the Municipal Court of Pristina, by which he was sentenced to one year and 6 months of imprisonment for unlawfully undertaking construction works, a Judgment he appealed against until the Supreme Court. He alleges that decisions of the regular Courts are unlawful due to the fact that he has nothing to do with the re-construction of the building, which was the object of the criminal proceedings, and that his constitutional rights have been violated, however not specifically making reference to the constitutional provisions violated.

The Constitutional Court decided to reject the Referral as inadmissible due to the fact that it was submitted after the 4 month period, as stipulated by the Law on Constitutional Court and that the Applicant failed to specify constitutional rights that have been violated.

Pristina, 14 December 2010
Ref. No.: RK 45/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 67/09
Applicant
Idriz Ratkoceri
CONSTITUTIONAL REVIEW
of
Judgment of the Municipal Court of Pristina, P. 1216/2004, dated 3 February 2006

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

Applicant

1. The Applicant is Mr. Idriz Ratkoceri, residing in Obiliq.

Challenged court decisions

2. The decision challenged by the Applicant is the Judgment Judgment of the Municipal Court of Pristina, No. P.1216/2004, dated 3 February 2006.

Subject matter

3. The Applicant requests the Court to evaluate the constitutionality of the Judgment of the Municipal Court of Pristina, No. P.1216/2004, dated 3 February 2006. In addition to this judgment the Applicant refers to the following judgments:

   a. Judgment of the District Court of Pristina No. Ap.203/06, dated 8 May 2007;

   b. Judgment of the Supreme Court Pkl.no.56/07, dated 20 October 2008; and

   c. Judgment of the Supreme Court Pkl.no.106/2009, dated 23 April 2010.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 20 of the Law (No. 03/L-121) on the Constitutional Court of the Republic of Kosovo of 16 December 2009, (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. On 3 December 2009. The Applicnt submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 16 March 2010, the Referral was communicated to the Supreme Court, which, so far, has not submitted any comments.

7. On 14 December 2010, the Review Panel, consisting of Judges Robert Carolan (Presiding), Deputy President Kadri Kryeziu and Judge Iliriana

Islami, considered t he Report of the Judge Rapporteur Ivan Čukalovič and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

8. On 3 February 2006, the Municipal Court of Pristina, in its Judgment P.no.1216/2004, sentenced the Applicant to one year and 6 months of imprisonment for unlawfully undertaking construction works under Article 294 (1) of Provisional Criminal Code of Kosovo (hereinafter: the "CPCK") in conjunction with Article 23 of the CPCK and ordered the Applicant to pay a compensation in the amount of 103.459,62 Deutsche Marks (52.898,06 Euros).

9. The Municipal Court ruled that, on 11 June 2001, the Applicant had, together with his son, endangered the life and body of a third person by re-constructing a building in Obiliq without a permit, causing substantial damages to the property of that person.

10. The Applicant appealed against the Municipal's Court's judgment to the District Court of Pristina, claiming a violation of essential criminal procedure provisions, an erroneous evaluation of the factual situation, and a violation of the CPCK. He also challenged the court's decision regarding the damages caused and the payment of compensation. On 8 May 2005, the District Court declared the appeal to be unfounded and upheld the judgment of the Municipal Court of Pristina.

11. Against this judgment the Applicant appealed to the Supreme Court, which, on 20 October 2008, found that the appeal was unfounded and upheld the judgments of the lower courts.

12. On 23 September 2009, the State Prosecutor submitted to the Supreme Court a request for the protection of legality against the decision of the District Court of Pristina, claiming that the dispositions of the judgment were not clear and in contradiction with the facts of the case.

13. On 23 April 2010, the Supreme Court rejected the State Prosecutor's request for protection of legality as unfounded.

Applicant's allegations

14. The Applicant alleges that the decision of the regular Courts are unlawful for the following reasons:

    a. He has nothing to do with the re-construction of the building, which was the object of the criminal proceedings, because he lives in his own

house at Meto Bajraktari Street, No. 20 in Obiliq since 1965, while his son lives in Hasan Street in Pristina.

b. His son had a construction permit (Urban Permit No. 04-351-519, dated 21 May 2002).

c. The re-construction of the building has not endangered the building of the third person

15. Hence, the Applicant alleges that he has been sentenced to imprisonment for a criminal act which he has not commited and that his constitutional rights have been violated.

16. The Applicant does not specify which articles of the Constitution have allegedly been violated in his case.

Assessment of the admissibility of the Referral

17. In order to be able to adjudicate the Applicants' Referral, it is necessary to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

18. As one of the requirements, the Applicant must establish that he has submitted the Referral within a period of 4 months, as stipulated by Article 49 of the Law. However, it appears from the Applicant's submissions that the final court decision regarding his case, was the judgment of the Supreme Court of 20 October 2008, served upon him on 13 November 2008, whereas he submitted his Referral to the Constitutional Court only on 3 December 2009, that is more than 4 months after the entry into force of the Law (see Article 56 of the Law).

19. Although it is true that, on 23 April 2010, the Supreme Court decided on the request for protection of legality, submitted by the State Prosecutor – who was not a party to the proceedings - on 23 September 2009, this procedure cannot be taken into account for the calculation of the 4 months period with respect to the court proceedings in the Applicant's case (see: mutatis mutandis, Brumarescu v. Romania, Application 28342/95, Judgment of 28 October 1999, para. 62).

20. In these circumstances, the Applicant cannot be considered to have met the requirement of Article 49 of the Law.

21. 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."

22. Under the Constitution, the Constitutional Court is not to act as a court of fourth instance, when considering the decisions taken by ordinary courts. It is the role of ordinary 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).

23. The Constitutional Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see among other 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).

24. The Applicant has not submitted any prima facie evidence indicating a violation of his rights under the Constitution (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005), as required by Article 113.7 of the Constitution and Article 48 of the Law.

25. It follows that the referral is manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, 48 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously, in its session of 14 December 2010:

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalovič, signed	Prof. Dr. Enver Hasani, signed

"Alder Com" Sh.p.k. vs. the Order of the President of the Municipality of Gjakova

Case. KI. 61/09, decision of 16 December 2010
Keywords: individual referral, assessment of the constitutionality, equality before the law, right to work and exercise profession, general principles of the Constitution

The Applicant has submitted a referral to assess the constitutionality of the Order of the President of the Municipality of Gjakova, through which he ordered the Manager of the Procurement Office of the Municipality not to award any tender to the Applicant due to a conflict with the municipal institutions. The Applicant alleges that by this order he was denied the right to work and exercise profession and equality before the law, and that the exclusion from participation in any tenders had caused to him material and moral damages.

The Constitutional Court decided to reject the Referral as inadmissible on the grounds that the Applicant failed to present any evidence to have appealed the challenged decision or to have made use of other legal remedies to dispute the decision. Furthermore, the Court notes that complaint of the Applicant relates to a period before entry into force of the Constitution, therefore rendering the Referral to be out of time.

Pristina, 16 December 2010
Ref. No.: RK72/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 61/09
Applicant
"Adler Com" Sh.p.k. from Gjakova

Constitutional Review of Order of the President of the Municipality of Gjakova, dated 22 January 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 Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is the company "Adler Com", Sh.p.k. from Gjakova, represented by the owner Mr. Brahim Gutaj, residing in Gjakova.

Challenged decision

2. The Applicant challenges the Order of the President of the Municipality of Gjakova, dated 22 January 2008.

Subject matter

3. The subject of the Referral is the assessment of the constitutionality of the order of the President of the Municipality of Gjakova, arguing that rights and freedoms protected by the Constitution were violated. In particular, the Applicant supports its claim based on Articles 3.1 [Equality before the law], 24 [Equality before the law], 49.1 [Right to work and exercise profession] and Article 119.1.2.3 [General Principles] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

Legal basis

4. Article 113.7 of the Constitution, Articles 20 and 22.7 and 22.8 of the Law (No. 03/L-121) on the Constitutional Court of the Republic of Kosovo of 16 December 2009, (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. On 27 October 2009, the Applicant submitted a letter to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court"), requesting the Court to consider the constitutionality and legality of the Order of the President of the Municipality Gjakova, dated 22 January 2008.

6. On 10 December 2009, the Court informed the Applicant that he had to use the Application Form of the Court for the submission of his Referral. On 15 March 2010, the Court once again reminded the Applicant that it had still not received the Application Form.

7. On 31 March 2010, the Applicant submitted the Referral to the Court.

8. On 6 April 2010, the Court sent a request to the Applicant to provide additional documents.

9. On 7 July 2010, the Referral was communicated, in accordance with Article 22 of the Law, to the President of the Municipality of Gjakova, which, so far, has not submitted any comments.

10. On 15 December 2010, the Review Panel, consisting of Judges Almiro Rodrigues (Presiding), Snezhana Botusharova and Gjyljeta, considered the Report of the Judge Rapporteur Ivan Čukalovič and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

11. It appears from the submissions of the Applicant that, on 22 January 2008, the President of the Municipality of Gjakova ordered the Manager of the Procurement Office of the Municipality not to award any tender to the Applicant during the year 2008, due to a conflict with the municipal institutions. The conflict apparently concerns court proceedings, initiated by the President of the Municipality before the Minor Offences Court of the Municipality of Gjakova, regarding an alleged violation of Articles 61 and 62(2) and (3) of the Municipality Regulation No. 4/2002 on Regulation of City and Municipal Services done by the Applicant.

12. The Minor Offences Court (Registered No. 04-771/07, dated 18 February 2009) suspended the proceedings on the ground that there are nos substantiating evidence that the Applicant had commited the concerned violation. Hence, it ruled that the allegations by the President of the Municipality of Gjakova were unfounded.

Applicant's allegations

13. The Applicant alleges that the Order of the President of the Municipality of Gjakova (hereinafter: "the President"), dated 22 January 2008, violates Articles 3 (1) [Equality Before the Law], 24 [Equality Before the Law], 49 (1) [Right to Work and Exercise Profession] and 119 (1), (2), (3) [General Principles] of the Consitution of the Republic of Kosovo (hereinafter: the "Constitution").

14. Furthermore, the Applicant alleges a violation of Article 58 of Law No. 03/L-040 on Local Self-Government, which stipulates that the president of a municipality does not have the authority to involve himself in procurement issues. Therefore, in the Applicant's opinion, the President

of Gjakova Municipality was not allowed to issue the Order of 22 January 2008.

15. He also claims that the President has violated Article 81 (1) (b) of the Law on Local Self-Government, for the reason that the Order should have been forwarded to the supervisory authority for regular review of legality, in accordance with Article 80 (1) of that Law, before sending it to the Applicant.

16. According to the Applicant, the underlying reason for the exclusion from being able to participate in any municipal tenders during 2008 were the proceedings initiated in the Minor Offences Court in Gjakova and that he had a conflict with the municipal institutions.

17. Allegedly, the exclusion from participation in any tenders had caused the Applicant material and moral damages.

Assessment of the admissibility of the Referral

18. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

19. In this connection, reference is made to Articles 113.7 of the Constitution and 47.2 of the Law, according to which individuals, who submit a referral to the Court, must show that they have exhausted all legal remedies provided by the law.

20. 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.

21. However, as to the present Referral, it appears that the Applicant has not requested the Procurement Review Body, in accordance with Article 95 (2) of Law No. 2003/17 on Public Procurement in Kosovo, to review the Order issued by the President of the Municipality of Gjakova.

22. Furthermore, it is noted that decisions of the Procurement Review Body, issued under Article 95 (2) of the Law on Public Procurement, can be reviewed by a court of competent jurisdiction in accordance with the applicable law on judicial review of administrative matters (Law No. 02/L-28 on the Administrative Procedure of 22 July 2005), which, in

this case, is the Supreme Court of Kosovo, pursuant to Article 31 (5) of the Law on Ordinary Courts (Official Gazette of the Autonomous Socialist Province of Kosovo, no. 46/76).

23. Moreover, the Applicant has failed to submit any prima facie evidence that he is the victim of a violation of the rights and freedoms guaranteed by the Constitution (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005), because he did not state in the Referral, whether he has competed for any relevant tender and has not been awarded it, due to the Order of the President of the Municipality of Gjakova.

24. Additionally, the Constitutional Court notes that the Applicant complains of the Order of the President of the Municipality of Gjakova, dated 22 January 2008. This means that the Referral relates to events prior to 15 June 2008 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 Jasioniene v. Lithuania, Application no. 41510198, ECHR Judgments of 6 March and 6 June 2003).

25. It follows that the Referral is Inadmissible

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, 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 shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Prof.Dr.Ivan Čukalovič, signed	Prof. Dr. Enver Hasani, signed

MunicipaIity of Klina vs. Independent Oversight Board of Kosovo

Case KI 07/10, decision of 16 December 2010
Keywords: Referral submitted by the legal person, assessment of the constitutionality, jurisdiction and authorized parties

The Applicant has submitted a referral through which he challenges the decision of the Independent Oversight Board of Kosovo (IOBK) ordering the Municipality of Klina to respect the employment contract and return to work head of the Head of the Inspectorate Section in the Department of Urban Planning and Public Services, who has been dismissed from work based on a decision of the Municipality of Klina, even though his employment contract was extended. He alleges that IOBK has violated the Constitution because such decision is not in accordance with the relevant provisions of the regulation on the Kosovo Civil Service, which provides only the authority of the party to file a complaint to IOBK, and not also to decide on return of civil servant to his previous position.

The Constitutional Court decided to reject the referral as inadmissible on the grounds that the Municipality has the right to submit a referral directly to this Court only if it contests the " acts of the government" and given that IOBK is an independent authority, its acts do not constitute acts of Government. Furthermore, the Court also decided even if it was assumed that referral was admissible, in which case the Municipality would be a legal person submitting this referral, still the Applicant has not exhausted all legal remedies, as required by the Constitution.

Pristina, 16 December 2010
Ref. No.: RK 74/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 07/10
Applicant
Municipality of Klina

Constitutional Review of Decision of the Independent Oversight Board of Kosovo, No. 112/08, dated 5 June 2009

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

Applicant

1. The Applicant is the Municipality of Klina, represented by Xhavit Dauti, a practicing lawyer from Klina.

Challenged decision

2. The Applicant challenges the Decision of the Oversight Board of Kosovo (hereinafter: IOBK) No. 112/08 of 5 June 2009, which was served on the Applicant on 16 June 2009.

Subject matter

3. The Applicant challenges the decision of the IOBK pursuant to Article 113.4 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

Legal basis

4. Articles 113.4 of the Constitution, Article 22 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").GHa

Proceedings before the Court

5. On 27 January 2010, the Applicant filed a referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 24 March 2010, the Referral was communicated to the IOBK, which replied on 13 July 2010, stating that it had taken its decision based on Article 11.1 of UNMIK Regulation 2008/12 on amending UNMIK Regulation 2001/36 on the Kosovo Civil Service, which authorizes the IOBK to review complaints submitted by civil servants and that the Referral of the Applicant was unfounded.

7. On 13 December 2010, the Review Panel, consisting of Judge Almiro Rodrigues (Presiding) and Deputy President Kadri Kryeziu, and Judge Gjyljeta Mushkolaj, considered the Report of the Judge Rapporteur Iliriana Islami and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

8. On 31 January 2008, the Acting Director of the Department of Administration and Personnel of Klina Municipality, through Notification No. 02-118-481/08, dated 31 January 2008, informed the Head of the Inspectorate Section in the Department of Urban Planning and Public Services (hereinafter: "HIS") of the termination of his contract of employment as of 29 February 2008. The given reason was that, due to the reorganization of the municipal executive, pursuant to UNMIK Regulation No. 2007/30 on Self-Government of Municipalities in Kosovo, the post, which he had occupied since 1 July 2005, had to be suppressed despite his contract of employment having been extended from 2 July 2007 to 30 June 2010.

9. On 26 February 2008, pursuant to Article 35 of Administrative Direction No. 2003/02, implementing UNMIK Regulation No. 2001/36 on the Kosovo Civil Service, the Acting Director of the Department of Administration and Personnel of Klina Municipality, confirmed the decision on the termination of the HIS' employment contract.

10. Unsatisfied with the decision, the HIS submitted an appeal (Appeal No. 01-118-865/08 of 5 March 2008) with the Municipal Appeals Board.

11. On 8 April 2008, the Appeals Board rejected the appeal as unfounded, stating that Klina Municipality decided to re-organize the municipal departments on 14 January 2008, one of them being the Municipal Inspection Department and to suppress the post of Head of the Inspectorate Section.

12. On 5 June 2009, the IOBK, to which the HIS had appealed, granted the appeal, annulling the decision of the Appeals Board.

13. Moreover, the IOBK instructed Klina Municipality to honor all rights of HIS under his contract of employment and, if unable to do so, to act in accordance with Article 11.1 of Administrative Direction 2003/2 Implementing Regulation 2001/36 on the Kosovo Civil, stipulating that, in case of an arbitrary dismissal, civil servants, have to be reassigned to a new post which is in line with their qualifications and competence.

14. The IOBK also requested Klina Municipality to be notified of the measures it would take in accordance with the Board's decision and indicated that, if its decision would not be implemented, it would undertake the measures set forth in Article 11.4 of Regulation 2008/12 Amending Regulation 2001/36 on the Kosovo Civil Service (forwarding the decision of IOBK to the Prime-minister of Kosovo).

Applicant's allegations

15. The Applicant claims, that Decision No. 112/08 of 5 June 2009 of the IOBK has violated the Constitution, because it is not in conformity with the provisions of UNMIK Regulation 2001/36 on the Kosovo Civil Service and Article 35 of the Administrative Direction Implementing this Regulation, as well as Step 5 of the Administrative Instruction No. 2003/02 Implementing Regulation No. 2001/36 on the Kosovo Civil Service.

16. The Applicant further alleges that the IOBK, pursuant to Article 11, paragraph 11.1 of Regulation No. 2008/12 Amending UNMIK Regulation No. 2001/36 on the Kosovo Civil Service and Article 35 of Administrative Direction No. 2003/02 Implementing Regulation No. 2001/36 on the Kosovo Civil Service, may only review appeals from civil servants, but it is not authorized to reinstate a civil servant in his previous position.

Assessment of the admissibility of the Referral

17. In order for the referral to be admissible, it has first to be assessed whether the Applicant has fulfilled all admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure of the Court.

18. The Court notes that the Applicant submitted the Referral under Article 113.4 of the Constitution, which provides:

"*A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.*"

19. Article 101.2 of the Constitution provides that the IMK is an independent board.

20. According to UNMIK Regulation No. 2008/12 Amending Regulation No. 2001/36, dated 27 February 2008, article 7.1 provides:

"An Independent Oversight Board for Kosovo (hereinafter "the Board") is hereby established."

21. With Article 7.2 of UNMIK Regulation No. 2008/12 Amending Regulation No. 2001/36, dated 27 February 2008 it is provided that:

    "The Board shall be an autonomous body reporting directly to the Assembly of Kosovo. The Assembly of Kosovo shall forward all reports of the Board to the Prime Minister. All reports of the Board shall be public documents."

22. The fact that IMK is an independent board is also provided by Article 8.1 of this UNMIK Regulation which states that: *"The Board shall be composed of seven (7) members who shall be appointed by the Assembly of Kosovo according to open and transparent procedures."*, meaning that the members of the Board are not even proposed by the Government.

23. Further, IMK in respect to assessing the compliance with the governing principles of civil service in accordance with Article 13 of the above referred Regulation has conducted monitoring in the office of the Prime Minister, the Presidency, the Administration of the Assembly and this fact proves the independence of the IMK and proves the fact that the decisions of the IMK are not acts of the government but are acts of an independent body (see the Annual Work Report of IMK).

24. Further, the Law No. 03/L-192 on IMK, the scope of IMK is determined by law.

25. Therefore, the Applicant's allegation that a violation has occurred under Article 113.4, in the instant case, is incompatible with the Constitution because the competences of the Municipality under abovementioned article in order to submit a Referral to this Court are limited to the following: the laws or acts of the government infringing upon the responsibilities or diminishing the revenues of the municipality that otherwise is provided by Law on Local Self-Government and the European Charter on Local Self-Government. The Court in this case emphasizes that the decision of IOBK in this case does not violate these responsibilities because they are within the scope of the competences of this independent body guaranteed by the Constitution and laws, and are part of the authorized responsibilities within Constitutional limits of local self government. Given the facts it is clear that the Referral of the municipality in its content is incompatible with the Constitution under the principle *ratione materiae*.

26. Furthermore, Article 11.6 of UNMIK Regulation No. 2008/12 Amending UNMIK Regulation No. 2001/36 on the Kosovo Civil Service provides that:

    "A Board decision constitutes a final administrative decision subject to judicial review in accordance with the applicable law."

27. Based on the submitted documents, the Applicant has not submitted any evidence that he has appealed the decision in accordance with the Legal advise. In accordance with Article 31 (5) of the Law on Regular Courts, Official Gazette of the Socialist Autonomous Province of Kosovo No. 21/1978 (Law on Regular Courts) final administrative decisions are reviewed by the Supreme Court in an administrative conflict procedure.

28. Even if we assume that the Applicant has had real competence to submit this Referral, the Court deems that in compliance with Article 113.7 in conjunction with Article 21.4 of the Constitution, which provide:

    "113.7 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."

    "21.4 Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."

The Applicant has not submitted any evidence that he has not exhausted all legal remedies under applicable law.

29. 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. This is an important aspect of the subsidiary character of the Constitution. (see: Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, of 27 January 2010 and, *mutatis mutandis*, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999).

30. For these reasons, the Referral is Inadmissible.

FOR THIS REASON

The Constitutional Court, pursuant to Article 113.4 of the Constitution, 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 shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr.Iliriana Islami, signed	Prof. Dr. Enver Hasani, signed

Xhafer Maliqi and others vs. Kosovo Bar Association

Case KI 04/10, decision of 16 December 2010
Keywords: individual referral/group of individuals, freedom of election and participation.

The Applicant has submitted a referral against Kosovo Bar Association (KBA) claiming that KBA violated the Constitution when it approved the new statute, accompanying regulations and elected the new President and other bodies based on the old Law on Bar, and not the new Law on Bar which was in force at that date. According to the applicants, their freedom of election and participation have been violated, when all these actions have been completed at the meeting of the Assembly of KBA which did not comply with the requirements of the new Law related to the necessary quorum.

The Constitutional Court decided to reject the referral as inadmissible on the grounds that applicants have not exhausted legal remedies available to them , also including appeal of acts of the KBA in front of Government, besides the lower courts.

Pristina, 16 December 2010
Ref. No.: RK 73/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 04/10
Applicants
Xhafer Maliqi and others
vs.
Kosovo Bar Association

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 Applicants are Xhafer Maliqi, Bajram Maraj, Betim Shala, Feriz Gërvalla, Jonuz Rama, Iliriana Osmani Serreqi, Ramë Dreshaj, Mexhid Syla, Fazli Balaj, Arianit Koci and Burim Xhemajli of whom Bajram Maraj, Betim Shala, Feriz Gërvalla, Ramë Dreshaj, Bajram Tmava, Mexhid Syla, Fazli Balaj and Burim Xhemajli are represented by Xhafer Maliqi, who is also a practicing lawyer in Pristina.

Respondent Party

2. The Respondent party is the Kosovo Bar Association (hereinafter: the "KBA").

Subject Matter

3. The Applicants claim that the members of the Assembly of the KBA, in the composition as convened on 19 September 2009, took decisions that were not in accordance with the applicable Law on the Bar and in violation of Article 45 [Freedom of Election and Participation] of the Constitution.

Legal Basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 22 of Law No. 03/L-121 on 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. On 20 January 2010, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court"), together with a power of attorney, duly signed by the other Applicants, dated 22.01.2010.

6. On 24 March 2010, the Referral was communicated to the President of KBA, which, so far, has not submitted any comments.

7. On 15 December 2010, the Review Panel, consisting of Judge Almiro Rodrigues (Presiding), and Deputy President Kadri Kryeziu and Judge Gjyljeta Mushkolaj, considered the Report of the Judge Rapporteur Robert Carolan and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

8. Pursuant to Article 3.3 of Law No. 03/L-117, promulgated on 12 February 2009 (hereinafter: the new Law), the independence of the Bar is achieved through the organisation of lawyers through the Kosovo Chamber of Advocates, as an independent public organisation.

9. Pursuant to Article 22 of the new Law, the KBA Assembly is composed of all KBA Members, instead of the 78 members as provided by the previous law.

10. On 19 September 2009, the Assembly of KBA, in its composition under the previous law, was convened by its current President: for the approval of the KBA Statute and other KBA regulations; as well as for the election of the KBA President, the Deputy, and members of the KBA Board

11. An Assembly member apparently suggested that the Assembly meeting with the proposed agenda should not be held, since it would not be able to take lawful decisions, if the composition was in compliance with the new Law. His proposal was put to the vote of the Assembly and rejected.

12. Consequently, all decisions were taken by a majority of the members, present and voting, under the previous law.

Applicants' allegations

13. The Applicant alleges that, on 19 September 2009, the Assembly of the KBA was convened, approved the new statute of the KBA and other regulations, elected its President and other new bodies in accordance with the provisions of the old law (Law on the Bar and other Legal Assistance, Official Gazette of KSAK, No: 011-69/79) and not under the new Law (No. 03/L-117) on the Bar which was already in force on that date.

14. The Applicants, therefore, complain that the Assembly of KBA, was convened on 19 September 2009 in violation of the new Law on the Bar.

15. Hence, the KBA could not have adopted the decisions on 19 September 2009 in the way it had been done, because, according to Article 22 (2) of the new Law on the Bar, the Assembly should have been composed of all members of the Bar, i.e. all 500 registered members. However, only 78 of them (constituting the number of Assembly members under the previous law) had been convened, out of whom 55 were present. This means that the other registered members were victims of a violation of their right to take part in the meeting; to approve regulations; and to elect the President of the Bar and other bodies, in compliance with the applicable Law.

16. In sum, the Applicants claim that the members of the Assembly of the KBA, in the composition as convened on 19 September 2009, took the following decisions:

    a. Decision on the Approval of the Statute of the Kosovo Bar Association and other acts of the Bar Association.

    b. Decision on the election of the President and Vice President of the Kosovo Bar Association.

    c. Decision on the election of the Board of the Kosovo Bar Association

In their opinion, these decisions were not taken in accordance with the applicable Law on the Bar, but taken in violation of Article 45 [Freedom of Election and Participation] of the Constitution.

Assessment of the admissibility of the Referral

17. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

18. In this respect, Article 113.7 of the Constitution provides :

    "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."

19. In this respect, 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. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). 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 is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).

20. This Court applied this same reasoning when it issued a Resolution on 27 January 2010 on inadmissibility on the grounds of non exhaustion of remedies in the case of AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Case No. KI. 41 /09 and in the

Resolution of 23 March 2010 in the case of Mimoza Kusari-Lila vs. The Central Election Commission, Case No. KI 73/09.

21. This Court has not in this Referral addressed whether the statute of KBA violates the Constitution because that question was never asked in the Referral of the Applicants. The Court notes that this question should be raised, if raised at all, before the regular courts.

22. As to the present Referral, the Court notes that the applicable law at the time of the events, which are at the basis of the Applicants' complaint, was Law No. 03/L-117 on the Bar, promulgated on 12 February 2009. In its Article 28 [Supervision and cooperation with other bodies], the Law stipulates that:

"1. The Government of Kosovo monitors the lawfulness of the acts of the General Chamber of Advocates and is authorized to suspend the application of an act conflicting with the Law, pending the Supreme Court taking a decision on it. This monitoring is limited to the adherence to the law and legislation and must not undermine the autonomy of the Chamber of Advocates."

23. From the Applicants' submissions, however, it appears that they did not follow the procedure laid down in Article 28(1) of the Law on the Bar. The Court, therefore, concludes that the Applicants have not exhausted all legal remedies available to them under applicable law. It follows that the Referral must be rejected, pursuant to Article 113.7 of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, 47 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 shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan, signed	Prof. Dr. Enver Hasani, signed

The Independent Union of Workers of IMK Steel Factory in Ferizaj vs. Decision of the Municipal Court of Ferizaj, Decision C. No. 340/2001

Case KI. 08/09, decision of 17 December 2010
Keywords: individual referral/group of individuals, assessment of the constitutionality, right to work and exercise profession, the right to compensation for unpaid salaries, right to fair and impartial trial, right to an effective remedy

The Applicant has submitted a referral through which he alleges violation of the principle *res judicata* by the failure to execute a final judgment of the Municipal Court in Ferizaj, which approved the request for compensation of unpaid salaries to the former employees of this enterprise, who have been illegally dismissed from work. The Applicants allege that by non-execution of this final decision their right to work and exercise profession and right to fair and impartial trial have been violated.

The Constitutional Court decided to declare the referral as admissible on the grounds that Applicants have exhausted all effective remedies and that there have been violations of the right to fair and impartial trial and right to an effective remedy. Furthermore, the Court ordered the Government and Privatization Agency of Kosovo to execute the final decision of the Municipal Court in Ferizaj and within six months to report to the Constitutional Court on the measures undertaken in this direction.

Pristina, 17 December 2010
Ref. No.: AGJ 75/10

JUDGMENT
in
Case No. KI 08/09
The Independent Union of Workers of IMK Steel Factory in Ferizaj,
represented by Mr. Ali Azem, President of the Union.

Constitutional Review of the Decision of the Municipal Court of Ferizaj, Decision C No. 340/2001, dated 11 January 2002

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

The Applicant

1. The Applicant is the Independent Union of Workers of IMK Steel Pipe Factory from Ferizaj. In the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court"), it is represented by Mr. Ali Azem, President of the Union residing in Ferizaj.

The Challenged Decision

2. The decision challenged by the Applicant is the Decision of the Municipal Court of Ferizaj of 6 October 2008.

Subject Matter

3. The subject matter of this referral is the assessment of the constitutionality of the alleged violation of the principle *res judicata* embedded in Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"). The Applicant claims that the Municipal Court of Ferizaj, which, by judgment of 11 January 2002, approved the request for compensation of unpaid salaries of 572 workers of the socially-owned IMK Steel Pipe Factory (hereinafter: "IMK") in the amount of 25.649.250,00 Euro. That judgment has become final (*res judicata*) on 11 March 2002. On 22 December 2005, the same Municipal Court allowed the execution of the judgment. However, the execution has, so far, not been enforced.

4. The Applicant also alleges a violation of Article 49 [Right to Work and Exercise Profession] and of the right to compensation for unpaid salaries.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the "Law") and Sections 54 and 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules Procedure").

Proceedings before the Constitutional Court

6. On 3 March 2009, the Applicant filed a referral with the Court.

7. On 26 February 2009, the workers represented by the Applicant submitted a claim for execution to the Constitutional Court (hereafter "the Court"), requesting the execution of the final decision of the Municipal Court of Ferizaj, C. nr. 340/2001 of 11 January 2002, and to oblige IMK Steel Pipe Factory in Ferizaj to pay, within eight (8) days from the receipt of the decision of the Court, to the Applicant the amount of 25.649.250,00 Euro, with 3% interest rate from 13 March 2002 until the definite payment has been made, as well as the expenditures of the executive procedure.

8. On 3 March 2009, the Court notified the Applicant that the referral has been registered with the Court.

9. On 11 August 2009, the Court notified IMK of the Referral of the Applicant and requested the IMK to submit a reply in respect to the referral.

10. By Order of the President No. GJR. 10/09, dated 24 September 2009, Judge Altay Suroy was appointed as Judge Rapporteur.
11. On 1 October 2009, the President, by Order No.KSH. 08/09, appointed the Review Panel composed of Judge Almiro Rodrigues (Presiding), and President Enver Hasani and Judge Iliriana Islami.

12. On 12 November 2009, the Court sent a letter to the Applicant, requesting clarification regarding which rights have been violated, the concrete decision that is contested and the authorization to represent the workers. On 25 November 2009, the Applicant submitted the authorization verified by the Municipal Court of Ferizaj.

13. On 12 February 2010, the Court sent a letter to the Municipal Court of Ferizaj requesting information on what steps had been taken by the Municipal Court to execute decision C. no. 340/2001. On 12 February 2010, the Court sent a letter to the Privatization Agency of Kosovo[1] (PAK) requesting information whether PAK had been involved in the case referred by the Applicant and in the execution of decision C. no. 340/2001. On 12 February 2010, the Court sent a letter to the Kosovo Judicial Council (KJC) requesting information on the legal remedies that exist to execute decisions.

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[1] In accordance with Article 1 of the Law No. 03/L-067 on the Privatization Agency of Kosovo, the Privatization Agency of Kosovo is established as the successor of the Kosovo Trust Agency.

14. On 5 March 2010, the Court received a reply from PAK, providing a historical background of the case of the IMK workers.

15. On 11 March 2010, the KJC, upon the request of the Court dated 22 February 2010 to provide information on the non-execution of the decision of the Municipal Court of Ferizaj (Decision C.no. 340/2001), replied and stated that it has received a reply from the Municipal Court of Ferizaj on 10 March 2010, stating that, with the decision of the Municipal Court of Ferizaj (Decision E.no. 469/05) of 6 October 2008 all execution procedures had been suspended based on the notification of KTA that IMK was put in liquidation. The KJC further stated that this decision had been sent to the Applicant. On 23 March 2010, the Court sent the reply of PAK and the Municipal Court of Ferizaj to the Applicant for comments.

16. On 6 April 2010, the Applicant submitted its reply to the Court's request of 23 March 2010.

17. By order of the Court, No. 08-1-09/10, 21 September 2010, Public Hearing was decided to be held in case KI-08/09.

18. On 13 October 2010, a public hearing was held at which the Applicant's representative was present as well as representatives of the PAK and the NewCo IMK. The Municipal Court of Ferizaj was also invited to the public hearing but they did not respond. On the same date, additional documents were submitted by the Applicant and by PAK.

Summary of the facts

19. On 27 February 1990, the temporary management of the socially-owned enterprise IMK in Ferizaj, pursuant to the provisions of the Collective Interim Measures Laws, terminated the Contract of Employment of 572 workers, for the reason that they had been absent from work for five consecutive days. The workers filed an objection with the temporary management of IMK, but did not receive any reply to their objection. They then submitted a claim for judicial protection of their rights to the Basic Joint Labour Court in Pristina, considering the challenged decision of IMK unlawful on the ground that, during the days in question, they were not allowed to enter the factory and to continue work.

20. In 2001, the workers filed a claim in respect of their dismissal and the loss of wages from the date of their dismissal to the submission of their claim with the Municipal Court in Ferizaj.

21. On 11 January 2002, the Municipal Court of Ferizaj assessed the workers' claim in the light of Article 8 of the Law on Contested

Procedure and ruled that the claim was well-founded. The Court further stated that the IMK decision to annul the employment contract was unlawful and that all workers who had reported to work until 1 May 2001 should be reinstated in their positions at work or to working places adequate to their qualifications and working skills and should acquire all their rights from the labour relations with IMK from 19 February 1990 to 1 May 2001. The Court reasoned that IMK had not initiated disciplinary proceedings against the workers as required by the Law on Labour Relations and subsidiary regulations issued by IMK (IMK Regulation on Disciplinary and Material Responsibility) and had failed to prove through such procedures, that the workers had been absent from work for five consecutive days. The Municipal Court further found that the workers had reported to work every day from 19 February to 5 May 1990, but that police forces had not allowed them to enter. Furthermore, none of the workers had received any individual decision regarding the termination of the labour relationship nor any decision of the Basic Joint Labour Court regarding their claim for judicial protection of their rights; thus, the matter had, so far, not received any judicial attention. The Municipal Court's judgment contained the information that an appeal against it should be filed with the District Court in Pristina within eight days from the day of receipt of a written copy of the judgment. IMK, however, didn't make use of this remedy. Since IMK didn't submit an appeal to the District Court in Pristina, the judgment of the Municipal Court of 11January 2002 became *res judicata* on 11 March 2002.

22. On 20 March 2002, the Executive Board of IMK decided to approve the request of the workers to execute the decision of the Municipal Court of Ferizaj and to reinstate the workers in their positions at work in accordance with the judgment. The Executive Board concluded that IMK would take action to compensate the workers in accordance with the judgment and, therefore, no execution procedure before the court needed to be initiated. The Financial Branch of IMK calculated the amount of compensation for the workers. Since IMK did not have the financial means to compensate the workers at the time, IMK would take the responsibility to compensate the workers by other means such as issuing securities. Moreover, if, in the meantime, IMK would undergo an ownership transformation and IMK would not compensate the workers, the workers would have the right to become share holders in the company.

23. Apparently, since they didn't obtain what IMK had promised to them, the workers seized the Municipal Court in Ferizaj once more in order to request the court for an execution order of its judgment of 11 January 2002.

24. On 22 December 2005, the Municipal Court in Ferizaj allowed the execution of its judgment of 11 January 2002, while, at the same time it prohibited the privatization of IMK by the Kosovo Trust Agency (KTA).

25. On 16 January 2006, a single judge of the Municipal Court in Ferizaj decided, *ex officio* to allow the execution of its decision of 22 December 2005 against IMK, but to reverse the part of the decision where the court had prohibited the privatization of IMK. The judge reasoned that, although the Court had allowed for the entire execution of the claim of 912 workers for the payment by IMK of salaries amounting to 25.649.250 Euros with a yearly interest of 3% starting from 13 March 2002 (based on the executive title of judgment of 11 January 2002), it was assessed, upon review of the file by the judge, that a mistake had been made in the procedure for allowing the execution, because, at the same time, the court had - erroneously - imposed the interim measure of staying the sale of IMK by KTA for privatization purposes. In the judge's opinion, KTA had been established under UNMIK Regulation No. 2002/12 of 13 June 2002 as an independent Agency, meaning that issues and cases that had to do with the privatization of assets of Socially Owned Enterprises (SOEs) had to be excluded from the jurisdiction of the local courts in conformity with that Regulation. The judge concluded that the proposal of the creditors (the workers) to allow the imposition of the interim measure of prohibiting the sale of IMK, had, therefore, to be rejected in conformity with the provisions of the Law on Contested Procedure, whereas the rest of the ruling on allowing the execution remained untouched.

26. In March 2006, the Head of the Trade Union stated that, if there were no means available to compensate the workers, they should get shares in the ownership of IMK.

27. On 25 March 2006, the workers made an additional proposal to the Municipal Court for the forceful execution of its decision of 16 January 2006..According to the workers, they, as creditors, had been unable to realize their financial claims, as ordered by the decision of the Municipal Court of 16 January 2006, due to the lack of financial means of IMK. They requested the Municipal Court to determine, on the basis of its previous decision of 16 January 2006 as executive title, the execution in kind against IMK of the payment of the debt and the hand-over of movable and immovable items of IMK for the preservation of their rights. The workers further proposed that any action against the court order by IMK would engage criminal responsibility and that, provided that IMK would not be successful in realizing the debt, they, as the creditors, would become co-owners of IMK up to the amount awarded to them.

28. On 25 March 2006, the District Court in Pristina refused a request of the workers to stop the privatization of the IMK, but upheld the decision of the Municipal Court's judge of 16 January 2006 allowing for the execution of their full claim regarding the unpaid salaries and their re-employment.

29. In April 2006, KTA submitted a claim-suit in its capacity as third party to the Municipal Court in Ferizaj, requesting it to declare the court decision on execution inadmissible.

30. On 17 May 2006, the Municipal Court in Ferizaj decided to delay the execution and allow KTA, as a third party to the procedure, to submit, within 30 days of receipt of the judgment, a separate law suit with a competent court (the Special Chamber of the Supreme Court) in order to challenge the decision on execution.

31. On 14 June 2006, KTA requested the Municipal Court of Ferizaj to postpone the execution, determined by court order of 16 January 2006, until the termination of the separate law suit proceedings.

32. On 2 August 2006, KTA filed an appeal with the Special Chamber of the Supreme Court, pursuant to UNMIK Regulation 2002/12 and UNMIK Administrative Direction No. 2003/13, on behalf of IMK. KTA alleged, inter alia, that it was essential that the Special Chamber was aware that its decision on the application of the law in this case was not only a decision of general public importance, but would be the precedent of how the law should be applied in unpaid wages claims and, in particular, would be the precedent for the Liquidation Committees as to how to deal with the several thousand claims of this nature. KTA further stated that the primary reason that KTA had not been able to privatize IMK was due to the fact that, in January 2002, 912 current and former IMK employees obtained a judgment against IMK from the Municipal Court in Ferizaj, dated 11 January 2002, restoring their employment rights and awarding them 25,649,250 Euros. In KTA's opinion, the workers relied on this judgment and the subsequent Execution Decision to assert a right of ownership over IMK and its assets and that this in turn prevented the progressing of a successful privatization of IMK.

33. On 9 August 2006, the Special Chamber rejected the appeal by KTA, stating that, on 2 August 2006, 46 days after the deadline given by the court, KTA had handed over this prequalification appeal to the Special Chamber and provided detailed arguments, which exclusively dealt with the merits of the judgment issued in January 2002. In the Chamber's opinion, it was clear that KTA was making attempts to appeal that judgment of 2002. Moreover, the Municipal Court was competent to

decide on the claim-suit of January 2002 and that the respective judgment was never appealed and had become final (res judicata). The Special Chamber further stated that a universal principle accepted by all courts everywhere in the world said that the final judgment had to be issued by a court of jurisdiction which was competent to review the merits; the judgment was final and did not spread suspicion over the rights of interested parties once the right to appeal has expired. In the Chamber's opinion, this principle represented an absolute obstacle for any subsequent action which would be initiated either before the trial court or court of appeal. The Special Chamber then referred to the European Court of Human Rights, which, according to the Chamber, had dealt with this issue in the most eloquent manner in the case of Stere and others versus Rumania[2], from which the Chamber quoted the following part :

"In this connection it should be recalled that the rule of law, as one of the fundamental principles of a democratic society, is inherent in all Articles of the Convention (see Broniowski v. Poland [GC], no. 31443/96, § 147, ECHR 2004-V). It presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become res judicata. No party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case (see, for example, Sovtransavto Holding v. Ukraine, no. 48553/99, § 72, ECHR 2002-VII, and Ryabykh v Russia, no. 52854/99, § 52, ECHR 2003-IX). Were that not the case, the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law".

34. On 19 September 2006, KTA issued a press release, named "KTA Statement on Municipal Court Decisions Regarding Employee Compensation from 1990s", in which it stated that, in the case of IMK, one proposed remedy, to allow execution against the assets of IMK to the workers who were party to the suit - would bring about the liquidation of IMK, the consequences of which would be months of uncertainty and diminish the sums available to all creditors, including the workers. In KTA's opinion, in order to preserve and enhance the value of socially-owned enterprises (SOEs, like IMK) the optimal strategy is to privatize them via spin-off, by separating the productive elements of the NewCo into a discreet entity, which could then receive new capital, new management, new technology and, in many cases, re-hire some or all previous employees. KTA further claimed that the effect of these lawsuits for back wages, when coupled with a remedy which includes attacking

[2] Application No. 25632/02 dated 23 February 2006

the assets of the SOE, would have the undesirable and negative effect of ending the possibility of creating a viable NewCo which could interest outside investors into bringing new capital into Kosovo. Finally, in KTA's view, the Special Chamber reviewed the decisions and procedures of KTA and would have the right to decide that the workers should be compensated for back wages, but the larger question was not simply "should the employees be compensated", but "how" were the employees to be compensated, or by "whom?". Although KTA fully understood and appreciated the hardships experienced by the workers of SOEs, who were dismissed from their positions in the 1990s in a discriminatory fashion, it was of the view that, under the applicable laws, courts were not able to give ownership of an enterprise to judgment creditors and that awarding possession of the SOE to such workers would, ultimately, hinder the rapid growth of the economy in Kosovo, by forcing KTA to undertake unnecessary liquidations, which would result in the net loss of potentially productive industries. Accordingly KTA would continue to save and protect jobs by pursuing its privatization program for the full benefit of all in Kosovo.

35. On 2 October 2006, the workers requested the Municipal Court in Ferizaj to reject the proposal for postponement of the execution, arguing that the postponement of the execution, as proposed by IMK, would cause considerable irreparable damage to them and that a postponement can only be obtained with their consent as creditors.

36. On 11 December 2006, the Municipal Court in Ferizaj froze the financial assets of IMK, obliging KTA to pay to the workers 25.649.250 Euro from the assets of IMK. On 11 December 2006, one Judge of the Municipal Court in Ferizaj addressed a letter to the KTA, stating that, due to continued pressure from the workers upon him personally and upon the court, he requested KTA to accept the request of the IMK workers and to deal with this case as it had done in previous cases such as NSH KD "Tefik Qanga" in Ferizaj, NSH SHAM "Semafori" etc, where the workers concerned had similar financial claims as the workers of IMK and the court in those cases had requested KTA to finalize those claims.

37. On 13 December 2006, KTA issued a press release, stating that it had received only one bid for NewCo IMK, while in the first round of bidding, held the previous week, two bids were received. It was further stated that the price offered for the second and final bid for IMK was 3.657.000 Euro, with an investment commitment of 13.200.000 Euro and an employment commitment of 80 persons.

38. On 2 April 2007, the Applicant filed a claim with the Special Chamber seeking to annul all privatization procedures relating to lMK and

requesting a preliminary injunction seeking to enjoin KTA from proceeding with the sale of NewCo IMK. By decision of 17 December 2007, the Special Chamber rejected the claim of the Applicant, stating that, if the Applicant could prove an ownership interest in property privatized by KTA, it would annul that transaction. However, in the absence of such proof, it could not. Therefore, since the Applicant had no ownership rights, it had no standing to claim that the sale of IMK by KTA was a violation of its property rights. In the Special Chamber's opinion, the language of the decision of the Ferizaj Municipal Court of 25 March 2006 does not convey ownership. Rather it states: "The creditor...shall enter into co-ownership with debtor to the extent of the disputed requests... ...in case the creditors have no success to realize the debt in cash...". According to the Chamber, this document simply promised a future grant or an ownership interest on two conditions : first, that the extent of the disputed fractional share of that ownership would later be determined. In other words, one first had to determine the full value of the enterprise, and then calculate the fractional shares based on the court's determination of each creditor's claim. That was never done, so the award was never made; second, all this was to be done only after creditors failed to have success in recovering their claims in cash. This was also left to a future determination. The Special Chamber further stated that the Applicant had a claim pending for unpaid wages from the illegal termination of their employment, a claim which was based on the 2002 judgment which was final.

39. On 8 February 2008, the Applicant filed a request for review of the judgment with the Special Chamber. On 13 March 2008, the Special Chamber rejected the request for review (Decision SCA-08-0021).

40. On 24 April 2007, the Municipal Court in Ferizaj rejected the claim of IMK, represented by KTA, to re-open the procedure which ended with the judgment of the Municipal Court in Ferizaj of 11 January 2002, based on the fact that the claim was out of time.

41. On 14 June 2007, the Supreme Court, deciding on the request for protection of legality submitted by the State Public Prosecutor, annulled the judgment of the Municipal Court of 11 December 2006 and returned the case to that court for review.

42. On 23 October 2007, the Municipal Court in Ferizaj reviewed the case and blocked once more the financial assets of IMK, while, at the same time, annulling all its previous execution decisions.

43. On 20 November 2007, the Special Police occupied IMK, prohibiting the workers to continue to work.

44. On 21 November 2007, KTA publicly announced that IMK had been fully privatized for the amount of 3.200.000 Euro and that the new owner had made an employment commitment for 360 workers and to invest 13.2 million Euros.

45. On 17 December 2007, the District Court in Pristina refused the appeal of KTA against the decision for execution of the Municipal Court of 1 December 2006 as unfounded.

46. On 18 December 2007, the Board of Directors of KTA declared IMK in liquidation on the basis of Section 9.1 of UNMIK Regulation 2002/12[3]. Thereupon the workers presented a credit request to the Liquidation Commission.

47. On 10 March 2008, the workers requested the Municipal Court in Ferizaj to annul the sales contract between the purchaser of IMK and KTA. They alleged that the sales agreement should be revoked as null and void, illegal, harmful, arbitrary and in contradiction with the final judgments of the Municipal Court in Ferizaj of 11 January 2002 and 16 January 2006, the decision of the District Court in Pristina Ac.Nr.589/2007, as well as the final decision of the Special Chamber of the Supreme Court. They further submitted that, when the respondents [the purchaser and KTA] considered that they could not realize their goal by exhausting all the legal remedies, they were now intentionally making obstacles to the execution of the final judgment of the Municipal Court in Ferizaj by even threatening with violence, when during the night of 20 November 2007 and with the use of special police units, the respondents made a forceful entry at IMK and prohibited the workers to enter with the justification that the purchaser had bought IMK for 3.200.000 Euro. The workers finally stated that the purchaser of IMK and KTA requested them to accept the transaction as fair and conditioned to start working with this acceptation, with the sole purpose to eliminate the final judgments and decisions of the most sacred bodies in modern civilizations, namely, the courts. They requested the Municipal Court to order the respondents to return the right to free and peaceful enjoyment and use of IMK, to the workers, who had worked in it until forcefully removed by the police and to appoint a respective institution or group of experts to determine the real value of the 29 hectares of land, buildings and all industrial equipment and goods in stock as well as other equipment for the normal functioning of IMK. They proposed to the Municipal Court to annul the

[3] The Agency may initiate a voluntary liquidation of a Socially-owned Enterprise or any part thereof, where it deems such proceedings are in the interest of the creditors and/or Owners of such Socially–owned Enterprise. The Agency shall conduct the liquidation pursuant to the procedures established under the Regulation on Business Organizations, unless otherwise provided in the present Regulation.

agreement between the respondents and in violation of the final judgments rendered in all instances.

48. On 9 August 2008, the Committee for Human Rights, Gender Equality, Missing Persons and Petitions of the Assembly of Kosovo responded to a petition of the IMK workers of 17 March 2008, stating that it had reviewed the letter of the IMK workers, who had exercised a claim-suit for the annulment of the transaction contract of IMK between a person from Ferizaj and the KTA office in Gjilan. While referring to Judgment 469/2005 of the Municipal Court, upheld by the District Court and the Special Chamber of the Supreme Court, which all agreed that the 912 workers should return to their workplaces, and considering the actions against the execution of the judgments which were in favor of the workers, the Committee assessed that the case fell within the scope of its mandate and, therefore, concluded to uphold the judgment of the Municipal Court in Ferizaj and, at the same time, required the execution of the final judgment.

49. On 6 October 2008, the Municipal Court in Ferizaj suspended ex officio the execution following a notification sent to the Court by KTA that IMK had entered the liquidation process. The workers did not appeal against this decision because they were not notified about the decision in question. They were notified first after one year had passed and several protests before the Municipal Court of Ferizaj.

50. On 29 September 2009, the Municipal Court in Ferizaj notified the Applicant of its decision of 6 October 2008, which it had already notified previously on 20 October 2008. On 5 March 2010, the Municipal Court in Ferizaj informed the workers again of its Decision of 6 October 2008.

The Applicant's complaints

51. The Applicant is representing 912 workers, whose claims against their employer IMK in Ferizaj have been honored by the courts since 2002, but the execution of which has, so far, not occurred. In violation of Article 49 of the Constitution [Right to Work]. The Applicant further complains that the final judgment of the Municipal Court in Ferizaj of 11 January 2002 has not been executed so far. , constituting a violation of the principle of *res judicata* embedded in Article 31 [Right to Fair and Impartial Trial] of the Constitution.

52. When the judgment of 11 January 2002 became *res judicata* on 11 March 2002 the workers had to be considered as creditors, as their claim had been granted. Since that date the workers have tried to have the res judicata decision executed until to date. The crux of the present

complaint is, therefore, whether, under applicable law, the 912 creditors have had the possibility to have that court decision properly executed. To that effect, the creditors had obtained several further court decisions in first instance and on appeal in their favor, allowing for the execution of the amount of 25.648.259 Euros, but until to date still without any result.

53. The Applicant refers expressly to the judgment of the Special Chamber of the Supreme Court of 9 August 2006, which confirmed that the Municipal Court in Ferizaj was competent to decide on the law suit on January 2002 and that the respective judgment, which was never appealed, had become final. The Applicant refers, in particular, to the following consideration of the Special Chamber:

"A universal principle accepted by all the courts everywhere in the world says, that [after] the final judgment shall be issued by a court of jurisdiction which is competent to review the merits, the judgment is final and does not spread suspicion over the rights of interested parties, once the right to appeal has expired. This principle represents an absolute obstacle for a subsequent action which would be initiated either before the court of trial or court of appeal. The European Court of Human Rights deals with this issue in the most eloquent manner in the case of *Stere and others vs. Romania*[4]:

"In this connection it should be recalled that the rule of law, as one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see Broniowski v. Poland [GC], no. 31443/96, § 147, ECHR 2004-V). It presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become res judicata. No party is entitled to seek for a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case (see, for example, Sovtransavto Holding v. Ukraine, no. 48553/99, $ 72, ECHR 2002-VII, and Ryabykh v. Russia, no. 52854/99, $52, ECHR 2003-IX). Were that not the case, the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law....".

54. In view of the above reasoning of the Special Chamber, the Applicants ask why the principle "that no party is entitled to seek a review of a final and binding judgment" has not been applied in the present case.

[4] Stere and others vs. Romania (application nr. 25632/02 dated 23 February 2006).

Relevant legal provisions concerning execution of judicial decisions

Law 2008/03-L008 on Executive Procedure

55. In the Republic of Kosovo, the legal rules, procedures of execution and security of judicial decisions is regulated by the Law on Executive Procedure (Law No. 2008/03-L008).

    13.1 "The decision against which the objection is not filed in foreseen time-limit becomes final and executable."

    13.2 "The decision against which is refused the objection becomes executable, and if against it is not permitted an appeal, then it becomes also final."

    13.3 "The decision in which the objection is refused becomes final if against it is not filed an appeal in foreseen legal time-limit, or if the filed appeal is refused as un-grounded."

    13.4 "If by this law is foreseen that against the first instance decision might be filed an appeal instead of objection, then such a decision becomes executable, but it becomes final if there is no appeal filed within legal time-limit, or if filed appeal is refused as ungrounded."

Law on Execution Procedure SFRY PR No. 692 of 30 March 1978

Article 3. "Execution and security are set and implemented for by the ordinary court".

Article 9. "Against the final decision in the procedures of execution and security the revision and reopening of proceedings is not allowed."

Article 27. "As the means of execution to order to realize money demand can only be determined: selling of motive objects, selling of immovable assets, transfer/conversion of the demand into money, conversion into money of other property rights respectively into material and transfer of means which are kept in the account of the Social Book-keeping Service."

56. It should be noted that in the Republic of Kosovo, although it is not provided with in the law, it is a common practice by the courts to use Kosovo Police Force as a mean to enforce execution of final decisions.

Assessment of the admissibility and merits of the Referral

57. As to the present Referral, the Court notes that, on 11 January 2002, the Municipal Court assessed the Applicants' claims pursuant to the relevant provisions of the Law on Contested Procedure and ruled that the claims were well-founded, awarding to the Applicants the amount of 25.649.250,00 Euro, with 3% interest rate from 13 March 2002 until the definite payment would be made, as well as the expenditures of the executive procedure as well as their re-instatement in their previous positions. The judgment became *res judicata* on 11 March 2002. By decision of 22 December 2005, the same Court allowed for the execution of its judgment.

58. However, until today, that means almost 9 years after the *res judicata* decision and 5 years after the execution decision, the judgment has still not been enforced, although numerous related court proceedings have taken place. Moreover, in the meantime, the Kosovo Trust Agency (KTA) – which was established by UNMIK Regulation 2002/12 of 13 June 2002, that means after the Municipal Court decision of 11 January 2002 had become *res juducata* - privatized the debtor IMK by "special spin-off" procedure. According to this procedure, all assets of the debtor IMK were first transferred to a newly established NewCo IMK, leaving all debts, including the claims of the Applicants, with IMK. The NewCo IMK was subsequently privatized.

59. It follows that, even while the legal remedies, available under applicable law, have been exhausted by the workers, these remedies were not effective, in the sense that they did not bring about the expected result, because the workers are still waiting for the implementation of the Municipal Court decision of 11 January 2002.

60. Thus, all attempts by the Applicants to have the judgment of 11 January 2002 executed have remained without any success, the more so, since by decision of 6 October 2008, the same Municipal Court of Ferizaj suspended all execution activities. The only possibility left to assure their rights granted to them by the judgment of 11 January 2002, was to present a claim - as simple creditors - with the Liquidation Commission in charge of liquidating the debtor IMK, after the privatization of the NewCo IMK. These proceedings are still pending. The situation of non-implementation of the judgment of 11 January 2002 is, therefore, continuing until to date.

61. In this connection, the Court stresses that the right to institute proceedings before a court in civil matters, as secured by Article 31 of the Kosovo Constitution and Article 6, in conjunction with Article 13 of the

European Convention of Human Rights (ECHR), would be illusory, if the Kosovo legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that these Articles prescribe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions. To construe the above Articles, as being concerned exclusively with access to a court and the conduct and efficiency of proceedings, would be likely to lead to situations incompatible with the principle of the rule of law which the Kosovo authorities are obliged to respect (see, *mutatis mutandis*, *ECRtHR judgment in Romashov v. Ukraine, Application No. 67534/01, judgment of 25 July 2004*).

62. The rule of law is one of the fundamental principles of a democratic society and presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become res judicata. No party is entitled to seek for a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case (see, *mutatis mutandis, Sovtransavto Holding v. Ukraine, no. 48553/99, § 72, ECHR 2002-VII*). Were that not the case, the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law. The competent authorities are, therefore, under a positive obligation to organize a system for enforcement of decisions that is effective both in law and in practice and ensures their enforcement without undue delay (see, Pecevi v. Former Yugoslav Republic of Macedonia, no. 21839/03, 6 November 2008; Martinovska v. the Former Republic of Macedonia, no. 22731/02, 25 September 2006).

63. In the Court's opinion, the execution of a judgment given by any court must, therefore, be regarded as an integral part of the right to a fair trial guaranteed by the above Articles (see, *mutatis mutandis*, *Hornsby v. Greece, judgment of 19 March 1997, Reports 1997-II, p. 510, para. 40*). In the instant case, the Applicants should not have been prevented from benefiting from the decision, which had become res judicata, given in their favour.

64. By failing for such a long period of time to enforce the judgment of 11 January 2002, the appropriate authorities have deprived the provisions of Article 31 of the Constitution and Articles 6 and 13 of the ECHR of all useful effect.

65. In this connection the Court refers to Article 159.2 of the Constitution, providing that "All social owned interests in property and enterprises in

Kosovo shall be owned by the Republic of Kosovo". This can only be understood in the way that it is the Government of Kosovo which is responsible for all obligations of such enterprises, including the rights awarded to the Applicant by the decision of the Municipal Court of 11 January 2002 against the socially owned enterprise IMK.

66. In these circumstances, the Court concludes that the right to a fair and effective trial, as guaranteed by the above Articles of the Constitution and ECHR, has been violated.

FOR THESE REASONS,

The Constitutional Court, unanimously, in its session of 17 December 2010:

I. DECLARES the Referral admissible.

II. HOLDS that there has been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Articles 6 [Right to a Fair Trial] and 13 [Right to an Effective Remedy] of the European Convention of Human Rights.

III. HOLDS that the final and binding decision of the Municipal Court of Ferizaj must be executed by the competent authorities, in particular, the Government and the Privatization Agency of Kosovo, as the legal successor of KTA.

IV. HOLDS that, the Government and the Privatization Agency of Kosovo shall submit to the Court, in a six months period, information about the measures taken to enforce this Judgment.

V. This Judgment shall be notified to the Parties and to the Privatization Agency of Kosovo and communicated to the Government

VI. In accordance with Article 20.4 of the Law, this Judgment shall be published in the Official Gazette.

VII. The Judgment is effective immediately and it may be subject to editorial revision.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy, signed	Prof. Dr. Enver Hasani, signed

The Insurance Association of Kosovo vs. Law No. 03/L-179 on the Red Cross of the Republic of Kosovo

Case KI. 118/10, decision of 17 December 2010
Keywords: individual referral, interim measures, equality before the law, economy, right to labour and exercise of profession, economic relations.

The Applicant has submitted a referral through which it claims that Article 14.1.7 of the Law on Red Cross, according to which the Red Cross shall be financed, partly, by the imposition of 1% of the gross premium for compulsory motor insurance in Kosovo is unconstitutional. The Applicant also seeks an interim measure prohibiting the implementation of this article until a merit based decision is given by the Court.

The Constitutional Court decided to reject the request of the Applicant for interim measure on the grounds that that Applicant failed to present any evidence proving that insurance companies will suffer irrecoverable damage, such as going out of business.

Pristina, 17 December 2010
Ref. Nr. AGJ: 76/10 /

DECISION ON REJECTING A REQUEST FOR INTERIM MEASURES

Case No. KI118-10
The Insurance Association of Kosovo
vs.
Law No.03/L –179 on the Red Cross 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 Čukalovič, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Adopts the following Decision rejecting the granting of Interim Measures

Applicant

1. The Applicant is the Insurance Association of Kosovo having an address at 95, Enver Maloku Street, Pristina, through Fatos Zamji, Fatbardh Makolli and Rrushtem Qehaja the representatives of, Illyria, Siguria and Sigkos Insurance Companies, respectively.

Challenged Law

2. The Applicant seeks the annulling of Article 14.1.7 of the Law No.03/L – 179 on the Red Cross of the Republic of Kosovo. The Applicant also seeks an interim measure prohibiting the implementation of Article 14.1.7 of the Law from the date of the submission of the Referral until a merit based decision is given by the Court.

Subject Matter

3. The matter concerns Article 14.1.7 of the challenged Law which provides that the Red Cross of Kosovo shall be financed, partly, by the imposition of 1% of the gross premium for compulsory motor insurance in Kosovo.

Legal Basis

4. Articles 113.7 and 116.2 and of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Articles 20 and 27 of Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law) and Sections 52.1 and 54of the Rules of Procedure of the Constitutional Court (hereinafter referred to as: the Rules).

Proceedings before the Court

5. On 26 November 2010 the Applicant filed the Referral with the Secretariat of the Constitutional Court.

6. The President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and he appointed a Review Panel comprising Judges Robert Carolan, presiding and Judges Altay Suroy and Almiro Rodrigues.

7. The Court deliberated on the request for Interim Measures in private session on 13 December 2010.

Summary of the facts

8. Article 14.1.7 of the challenged Law provides as follows:

"1. For the purpose of fulfilling its tasks and objectives stipulated by this Law, the Red Cross of Kosovo shall acquire means from the following sources: ...

1. 7 obligatory insurance of the vehicles 1% (one percent) from gross prim of the value of vehicle insurance; ..."

9. The Applicant maintains that the Law contravenes the following Articles of the Constitution:

   Article 3 Equality before the law
   Article 10 Economy
   Article 24 Equality before the law
   Article 49 Right to labour and exercise of profession
   Article 119.2 Economic Relations – General Principles

The Request for Interim Measures

10. The Applicant requests the Court to annul only Article 14.1.7 of the challenged Law on that basis that it is unconstitutional and seeks an interim measure prohibiting the implementation of the 1% pending the final decision of the Court. The Applicant states, referring to official records of the Central Bank of Kosovo, that the value of the motor insurance premiums paid in Kosovo amounts to Euro 49,000,000.00 (forty nine million Euro) *per annum* and that the cost to the insurance industry would amount to Euro 490,000.00 (four hundred and ninety thousand Euro) *per annum* and that this would have to be paid to the Red Cross every year.

11. Article 116.2 of the Constitution provides –

Article 116 [Legal Effect of Decisions]

1. While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages.

12. Article 27 of the Law on the Constitutional Court provides –

Article 27 Interim Measures

1. The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a

subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.

2. The duration of the interim measures shall be reasonable and proportionate.

13. One of the tests for the granting of interim measures is whether unrecoverable damages will be suffered. If the Constitutional Court ultimately finds that Article 14.1.7 is unconstitutional then any damage suffered by either the Applicant or individual insurance companies can be calculated and if necessary a refund can be ordered to be made by the appropriate Court. There is nothing unrecoverable about the damage that is suffered. The Applicant does not make the case that it, Illyria, Siguria and Sigkos Insurance Companies or any other insurance company will go out of business by virtue of the imposition of the 1% charge. There are therefore no grounds, on that basis, to grant the Interim Measure requested.

14. The Constitutional Court therefore, without prejudice to any further decision to be made by the Court on admissibility or on the merits, unanimously in its session of 17 December 2010:

DECIDES

I. To reject the request for an Interim Measure;

II. This Decision shall be notified to the parties;

III. This Decision shall be published in accordance with Article 20.4 of the Law on the Constitution of Kosovo and is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova, signed	Prof. Dr. Enver Hasani, signed

Referral submitted by Acting President, Dr. Jakup Krasniqi, concerning the holding of the office of Acting President and at the same time the position of SecretaryGeneral of the Democratic Party of Kosovo

Case KO 97/10, decision of 22 December 2010
Keywords: Referral submitted by Acting President, assessment of the constitutionality, exercise of political party functions by the Acting President

The Applicant has submitted a referral through which he requested the Court to evaluate the constitutionality of the temporary holding and the exercising of the functions of President of the Republic of Kosovo and at the same time, exercising the position of the Secretary-General of PDK. The Applicant based his referral on the doubt whether the limitations of Article 88.2 of the Constitution, according to which after election, the President cannot exercise any other political party functions, are also applicable to the Acting President.

The Constitutional Court decided to declare the referral admissible on the grounds that in the role of the President, also the Acting President is allowed to refer matters to the Constitutional Court and that this was done within the deadline. Furthermore, the Court decided that holding and exercise of these two positions by the Acting President does not constitute violation of Article 88.2 of the Constitution, with justification that limitation of this Article are applicable only “after election” of the President. Therefore, the Court explained that President of the Republic is elected by the Assembly, whereas the responsibilities of the Acting President derive from the Constitution, therefore consequently Acting President is not limited by the Article 88.2.

Pristina, 22 December 2010
Ref. No.: AGJ 78/10

JUDGMENT

Case No. KO 97/10

In the matter of the Referral submitted by Acting President of the Republic of Kosovo, Dr. Jakup Krasniqi, concerning the holding of the office of Acting President and at the same time the position of Secretary-General of the Democratic Party 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 Čukalovič, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Dr. Jakup Krasniqi, the President of the Assembly of the Republic of Kosovo who is the Acting President of Kosovo.

Subject Matter

2. Whether Dr. Jakup Krasniqi as Acting President of the Republic of Kosovo is prohibited from holding and exercising the position of Secretary-General of the Democratic Party of Kosovo (PDK).

Legal Basis

3. Articles 84 (9) of the Constitution of Kosovo (the Constitution), Article 29 of the Law on the Constitutional Court (the Law) and Section 55 of the Rules of Procedure of the Constitutional Court (the Rules).

Proceedings before the Court

4. By a Referral dated 13 October 2010, received in the Constitutional Court on 14 October 2010, the Acting President of the Republic of Kosovo, bearing in mind the Judgment of the Constitutional Court in the case of Naim Rrustemi and 31 other Deputies of the Assembly of Kosovo and His Excellency, Dr Fatmir Sejdiu dated 28 September 2010, requested;

   i. Whether the limitation "after election, the President cannot exercise any other political party functions", as prescribed in Article 88.2 of the Constitution is also valid for the Acting President.

   ii. Furthermore, he requested "the evaluation of the constitutionality of the temporary holding and the exercising of the functions of President

of the Republic of Kosovo and at the same time, exercising the position of the Secretary-General of PDK".

5. Pursuant to the Rules of Procedure the President of the Court appointed Judge Iliriana Islami as Judge Rapporteur and appointed the following Judges as members of the Review Panel: Judges Ivan Čukalović (presiding), Enver Hasani (President) and Kadri Kryeziu (Deputy President).

Facts presented by the Applicant

6. On 27 September 2010 His Excellency, Prof. Dr. Fatmir Sejdiu, President of the Republic of Kosovo publicly announced his resignation from the office of President of Kosovo, following the announcement of the Judgment of the majority of the members of the Constitutional Court in the case brought against him by Naim Rrustemi and 31 other Deputies of the Assembly of Kosovo.

7. In that case this Court had found, by a majority decision, that there was a serious violation of the Constitution of Kosovo, namely Article 88.2, by His Excellency, Fatmir Sejdiu holding the office of President of the Republic and at the same time holding the office of Chairman/President of the Democratic League of Kosovo.

8. As President of the Assembly, Dr Krasniqi was given the duties and functions of the President of the Republic of Kosovo, under Article 90 of the Constitution, even though at all material time he continued and continues to hold and exercise the position of Secretary-General of the PDK.

9. He sought clarification as to whether the aforementioned limitation also applied to him because he was now the Acting President of the Republic of Kosovo.

Admissibility

10. Former President Sejdiu resigned from his office on 27 September 2010 after the Decision of the Constitutional Court in the referral referred to at paragraph 6 above. The President of the Assembly of Kosovo, the Applicant, then became the Acting President and he has performed the functions of President of Kosovo since then.

11. Under Article 84 (9) of the Constitution the President *"may refer constitutional questions to the Constitutional Court."*

12. The questions raised by the Applicant are "constitutional questions" as contemplated by Article 84 (9) of the Constitution. Namely, it is a relevant constitutional question to clarify whether the steps that the Acting President may take or the actions that he may be called upon to perform, while at the same time holding and exercising the position of Secretary-General of the PDK, constitute a serious violation of the Constitution.

13. What constitutes a constitutional question was addressed by this Court In the case of the Referral of the President of the Republic of Kosovo for Explanations Regarding Jurisdiction over the Case of the Mayor of Rahovec, Case No. KO 80/10. The Court gave Judgment on 7 October 2010 concerning the status of the resignation of the Mayor of a Municipality. The facts outlined in that case satisfied the Court that the matter was of sufficient importance to be rendered admissible. There will in due course, no doubt, be other Referrals on questions submitted by Presidents or Acting Presidents of the Republic of Kosovo.

14. It is proper that there be constitutional certainty as to the powers of an Acting President. It is not lightly that he has posed the question to the Court. The Constitutional Court is charged with answering such questions. In accordance with Article 112.1 of the Constitution, *"the Constitutional Court is the final authority for the interpretation of the Constitution"* and because of that there is no other body from whom the Applicant may seek an answer to these constitutional questions. The Court is of the opinion that the questions raised by the Applicant are "constitutional questions" that are contemplated by Article 84 (9) and that the questions raised are fit to be addressed by the Court.

15. An Acting President should be encouraged to consult the one body capable of dealing with constitutional questions, the Constitutional Court. For these reasons this Court finds that the Applicant has the standing or competence to refer the questions to the Court.

16. Article 84 (9) of the Constitution does not prescribe a time limit within which questions may be referred to the Court. It follows therefore that all the requirements for the admissibility of the Referral are met.

Merits

17. The Law on the President of the Republic of Kosovo, Law No. 03/L-094, was passed on 19 December 2008 and was published in the Official Gazette on 25 January 2009. This law does not mention in any way the role of an Acting President and therefore it cannot assist the Court in dealing with the particular questions referred to the Court.

18. The Court in its Judgment in the case of President Fatmir Sejdiu analysed the role of the President of the Republic of Kosovo and the compatibility of that role with the freezing/holding/exercise of the position of Chairman/President of the Democratic League of Kosovo. The functions of the President, as provided for in the Constitution, were carefully examined in its Judgment. It is not necessary now to restate them. The Court concluded, by a majority decision, that President Sejdiu had committed a serious violation of Article 88.2 of the Constitution by holding both roles at the same time.

19. The deputies of the Assembly of Kosovo in secret ballot elect the President of Kosovo. Article 86.1 states that "*The President of the Republic of Kosovo shall be elected by the Assembly in secret ballot.*" The President acts as head of state and he or she represents the unity of the people of the Republic of Kosovo. The principle of representative democracy which underpins the institutions and decision making in the Republic of Kosovo gives the choice of President to the elected representatives of the citizens. The limited period of six months provided by Article 90 of the Constitution beyond which an Acting President may not exercise the position of President is there to ensure that it is the Assembly of Kosovo that chooses who occupies that important position on behalf of the people of Kosovo.

20. Article 90 of the Constitution provides that an Acting President shall be the President of the Assembly of Kosovo. The President of the Assembly is elected by the deputies of the Assembly from amongst their own numbers. Article 67 provides for the election of the President of the Assembly and his or her principle functions in the following terms:

Article 67 [Election of the President and Deputy Presidents]

1. The Assembly of Kosovo elects the President of the Assembly and five (5) Deputy Presidents from among its deputies.

2. The President of the Assembly is proposed by the largest parliamentary group and is elected by a majority vote of all deputies of the Assembly.

3. Three (3) Deputy Presidents proposed by the three largest parliamentary groups are elected by a majority vote of all deputies of the Assembly.

4. Two (2) Deputy Presidents represent non-majority communities in the Assembly and are elected by a majority vote of all deputies of the

Assembly. One (1) Deputy President shall belong to the deputies of the Assembly holding seats reserved or guaranteed for the Serb community, and one (1) Deputy shall belong to deputies of the Assembly holding seats reserved or guaranteed for other communities that are not in the majority.

5. The President and Deputy Presidents of the Assembly are dismissed by a vote of two thirds (2/3) of all deputies of the Assembly.

6. The President and the Deputy Presidents form the Presidency of the Assembly. The Presidency is responsible for the administrative operation of the Assembly as provided in the Rules of Procedure of the Assembly.

7. The President of the Assembly:

(1) represents the Assembly;

(2) sets the agenda, convenes and chairs the sessions;

(3) signs acts adopted by the Assembly;

(4) exercises other functions in accordance with this Constitution and the Rules of Procedure of the Assembly.

8. When the President of the Assembly is absent or is unable to exercise the function, one of the Deputy Presidents will serve as President of the Assembly.

21. The functions of the President of the Assembly as provided for in the above Article are solely in relation to the internal workings of the Assembly and do not have the much more substantive functions and competences of the President of the Republic. Their roles are different.

22. The deputies of Assembly elect the President of the Assembly in an election that is entirely separate to the election of the President of the Republic. Article 88 of the Constitution, in its entirety, provides as follows:

Article 88 [Incompatibility]

1. The President shall not exercise any other public function.

2. After election, the President cannot exercise any political party functions.

23. Particular attention is drawn to the terms of Article 88.2 which prohibits the exercise of political party functions but only "After election...". These words,

in their ordinary meaning, seem to imply that the prohibition from exercising any political party function applies only to a President of the Republic who has been elected by the Assembly of Kosovo. Dr Jakup Krasniqi was not elected as President of the Republic of Kosovo. He was elected as President of the Assembly only. There is no prohibition in the Constitution on the exercise of political party functions on the President of the Assembly.

24. It would be stretching the meaning of the prohibition too much to require a President of the Assembly to cease exercising any political party function merely because of his or her becoming Acting President of the Republic of Kosovo pursuant to the provisions of the Constitution. The Court therefore finds that the that the “acting” nature of the Presidency now occupied by Dr Jakup Krasniqi does not prohibit him from holding and exercising the position of Secretary-General of the Democratic Party of Kosovo (PDK). He holds the position of Acting President. The functions of that role arise in accordance with the Constitution and they derive from the Constitution.

25. The Acting President is not an elected President and there may be questions as to the powers of an Acting President raised from time to time. No such question has been raised in the present Referral. Such questions are constitutional issues and the Court will address these issues upon proper request being made to it bearing in mind the doctrine of the separation of powers, as set out in Article 4.1 of the Constitution, and being alert of the obligation not to stray into the spheres of the other branches of government.

FOR THESE REASONS THE COURT UNANIMOUSLY DECIDES AS FOLLOWS

I. The Referral is admissible;

II. There is no prohibition on an Acting President of Kosovo exercising the party political functions mentioned in Article 88.2 of the Constitution;

III. The temporary holding and exercise of the functions of President of the Republic of Kosovo and at the same time exercising the position of the Secretary-General of PDK is not incompatible with the Constitution;

IV. 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 and,

V. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr.Iliriana Islami, signed	Prof. Dr. Enver Hasani, signed

The Ombudsperson of the Republic of Kosovo vs. the Law on Rights and Responsibilities of Deputies

Case KO 119/10, decision of 22 December 2010
Keywords: individual referral, interim measure, constitutionality, pensions, the Law on Rights and Responsibilities of Deputies, social justice, discrimination.

The Applicant has submitted a referral to assess the constitutionality of Articles 14(1)6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies. He alleges that these articles of the abovementioned law enable members of the Kosovo Assembly to realize pensions which are more favourable than any other retirement benefit for other citizens, and they are not in compliance with constitutional order upon principles of democracy, equality, non-discrimination and social justice. Finally, the Ombudsperson requested interim measure in order to suspend implementation of this law until the case is decided based on its merits.

The Constitutional Court decided to grant interim measures for a period of three months, by immediately suspending the implementation of the disputed law on the grounds that the Applicant have put forward enough convincing arguments that the implementation of the challenged provisions of the law may result in unrecoverable damages and that such an interim measure is in the public interest.

Pristina, 22 December 2010
Ref. No. MP 79/10

DECISION ON INTERIM MEASURES
in
Case No. KO 119/10
The Ombudsperson of the Republic of Kosovo
Constitutional Review of Articles 14 (1) 6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies,
No. 03/L-111 of 4 June 2010

composed of:
Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalovič, Judge
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is the Ombudsperson of the Republic of Kosovo.

Challenged law

2. The Applicant seeks the annulling of Articles 14(1)6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies, No. 03/L-111 of 4 June 2010.

Subject matter

3. Constitutional Review of Articles 14(1)6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies, No. 03/L-111 of 4 June 2010.

Legal Basis

4. Article 113 (2) of the Constitution of the Republic of Kosovo ("the Constitution") and as Articles 20 and 27 of the Law of the Constitutional Court of the Republic of Kosovo ("the Law").

Summary of the Facts

5. On 4 June 2010, the Law on Rights and Responsibilities of Deputies was approved by the Assembly of the Republic of Kosovo by a vote of 74 (seventy four) "for", 2 (two) "against" and 2 (two) "abstentions".

6. On 21 June 2010, the following non-governmental organizations (NGOs): Kosovo Democratic Institute (KDI), Forum for Citizens Initiatives (FIQ), "Fol" Movement, Community Building Mitrovica (CBM)[78], addressed the President of the Republic of Kosovo, with a request not to promulgate the abovementioned Law.

7. On 25 June 2010, Mr. Bahri Hyseni, Chairperson of the Committee for Legislation and Judiciary, Assembly of Kosovo, requested the Secretariat of the Assembly to rectify a technical omission made on the Law on Rights and Responsibilities of the Deputies, respectively Article 22 of the Law, that the age of retirement should be 55 years, and not as approved with the plenary session of 4 June 2010, that the retirement age be 50 years.

8. On 25 June 2010, the Assembly approved the request of Mr. Bahri Hyseni to rectify the technical omission made in the session of 4 June 2010. The request of Mr. Bahri Hyseni was approved by 73 (seventy three) votes "for" and 2 (two) votes "against".

9. On 5 July 2010, the Law on Rights and Responsibilities of the Deputies was decreed by the President of the Republic of Kosovo, by Decree DL-029-2010.

10. On 19 July 2010, the Ombudsperson Institution received a submission by a number of NGOs: Kosovo Democratic Institute (KDI), Forum for Citizens Initiatives (FIQ), Youth Initiative for Human Rights (YIHR), Kosovo Initiative for Stability (IKS), Initiative for Progress (INPO), Balkan Institute of Policies (IPOL), Council for the Defense of Human Rights and Freedoms (KMDLNJ), "Fol" Movement, Community Building Mitrovica (CBM), Policy and Advocacy Centre (QPA) and Syri Vision, which addressed the Ombudsperson Institution with a common request, that the Constitutional Court of the Republic of Kosovo, as per its duties and responsibilities provided by law, review the constitutionality of Article 22 of the Law on Rights and Responsibilities of the Deputy.

11. The above named NGOs consider that this Article is a violation of the Constitution of the Republic of Kosovo, and request to halt implementation of the law as planned, 1 January 2011, pending a merit-based decision by the Constitutional Court.

12. On 20 July 2010, the Law on Rights and Responsibilities of the Deputy was published in the Official Gazette of the Republic of Kosovo.

13. On 21 July 2010, the request made by the NGOs was joined by the Pensioners Union of Kosovo.

Proceedings before the Court

14. On 26 November 2010 the Applicant filed his Referral with the Constitutional Court.

15. The President of the Court appointed Robert Carolan as Judge Rapporteur, and he appointed a Review Panel comprising Judges Ivan Čukalović, Kadri Kryeziu and Gjylieta Mushkolaj.

16. On 17 December 2010, in private session, the Court deliberated on the preliminary Report of the Judge Rapporteur with regard to the granting of an interim measure pending the final outcome of the Referral.

The Applicant's Allegations

17. The Applicant considers, *inter alia*, that the Law on Rights and Responsibilities of the Deputy contains provisions "which enable members of the Kosovo Assembly to realize pensions which are more favourable than any other retirement benefit for other citizens, and they are not in compliance with constitutional principles of equality, rule of law, non-discrimination and social justice".

18. The Ombudsperson also "notes that supplementary pensions provided upon by Article 22 of the Law on Rights and Responsibilities of the Deputy are distinctly disproportional to the average pensions in the country, and as such, they are not compliant with the values proclaimed by Article 7 of the Constitution of the Republic of Kosovo, which founds its constitutional order upon principles of democracy, equality, non-discrimination and social justice".

19. Furthermore, the Article 38 of the Law on Rights and Responsibilities of the Deputy offers the possibility to deputies to return to their respective working places, if he/she was employed in the public sector prior to the term, or any institution funded by public funds. This provides them with some safety in terms of employment, which means that they do not risk unemployment, if they had been part of the public sector prior to the term. Also, they may get another working place; it is widely known that the general age of retirement in Kosovo is 65 years.

20. Finally, according to the Ombudsperson "the privileged status for the deputies of the Assembly of Kosovo in the existing legal order of the Republic of Kosovo, does not represent sufficient grounds to justify such a high level of deviation from the general principles in the field of pensions."

THE CONSTITUTIONAL COURT

After having heard the Judge Rapporteur, Robert Carolan, and having discussed the views of the Applicant expressed in its written submissions, the Court deliberated on 17 December 2010. The Court concluded, without prejudging the final outcome of the Referral, that the Applicant have put forward enough convincing arguments that the implementation of the challenged provisions of the Law on Rights and Responsibilities of Deputies, No. 03/L-111 of 4 June 2010 may result in unrecoverable damages and that such an interim measure is in the public interest.

FOR THESE REASONS

The Court, pursuant to Article 116(2) of the Constitution and Article 27 of the Law, unanimously

DECIDES

I. TO GRANT interim measures for a duration of no longer than three (3) months from the date of the adoption of this Decision;

II. TO IMMMEDIATLY SUSPEND the implementation of the Articles 14(1)6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies, No. 03/L-111 of 4 June 2010, for the same dukati

III. This Decision shall be notified to the Parties;

IV. This Decision shall be published in accordance with Article 20(4) of the Law and is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan, signed	Prof. Dr. Enver Hasani, signed

Agim Paca vs. Enver Hasani, former Rector of the University of Pristina

Case KI 88/10, decision of 22 December 2010
Keywords: individual referral, Law on Higher Education in Kosovo

The Applicant has submitted a referral to the Constitutional Court whereby he alleges that Mr. Enver Hasani, former Rector of the University of Pristina, violated several laws and by-laws during the exercise of his duties as a Rector of the University of Pristina, i.e. in his election as Regular Professor at the Law Faculty and Associated Professor at the Law Faculty. He claims that through these actions he has violated provisions of the Statute of the University of Pristina and the Law on Higher Education. The Constitutional Court decided to reject the referral as inadmissible on the grounds that the Applicant could not prove to be a victim of violation of his individual constitutional rights, as such; this referral is an *actio popularis* for which individuals are not authorized to submit referrals according to the Article 113 of the Constitution.

Pristina, 22 December 2010
Ref. No.: RK 77/10

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 88/10
Applicant
Agim Paca
vs.
Enver Hasani, former Rector of the University of Pristina

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
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

Applicant

1. The Applicant is Mr. Agim Paca residing in Pristina.

Opposing party

2. The opposing party is the former Rector of the University of Pristina (hereinafter: “UP”), Mr. Enver Hasani (hereinafter: the “Opposing Party”).

Subject matter

3. The Applicant alleges that the opposing party has violated the following laws and by-laws:

   a. The law on Civil Service of Kosovo;

   b. The Law on Higher Education in Kosovo;

   c. The Statute of UP;

   d. Administrative Instruction on Equivalence and recognition of diplomas earned at the Higher Education Institutions of Kosovo, Science and Technology issued by the Ministry of Education Science and Technology (hereinafter: the “MEST”) No. 15/2003 Article 4.1 under g); and

   e. Election regulations and procedures of University of Pristina in 2009.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 22 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. On 27 September 2010, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the “Court”).

6. On 21 October 2010, the Referral was communicated to the Opposing Party, which has not submitted any comments.

7. On 17 December 2010, the Review Panel, consisting of Judge Snezhana Botusharova (Presiding), Deputy President Kadri Kryeziu and Judge Iliriana Islami, considered the Report of the Judge Rapporteur Ivan

Čukalovič and made a recommendation to the Court on the inadmissibility of the Referral.

8. Mr. Enver Hasani, in his official capacity as President of the Constitutional Court of the Republic of Kosovo has not participated in any stage after the Referral being registered and has requested the Court to be excluded from participation during the deliberations. The Court approved his request.

Summary of the facts

9. Apart from his allegations, the Applicant has not submitted any documents in support of his claim.

Applicant's allegations

10. On 5 July 2006, the Senate, chaired by the former Rector of UP, Dr. Enver Hasani, held a meeting, where Dr. Enver Hasani was elected for the academic title Associate Professor at the Philosophical Faculty, Department of Political Sciences, although he did not provide any document proving that he possessed the equivalence assessment and nostrification/ acknowledgment of a PhD.

11. Furthermore, he obtained the academic title of a associated professor at the Philosophical Faculty of University of Pristina, while he was Rector of UP although he did not undergo the procedure of equivalence assessment and nostrification/ acknowledgment which is in contradiction of the Law on Higher Education in Kosovo, the MEST Article 4.1(g) and the Statute of the University of Pristina. In this way he managed, through the Senate of the UP – to ensure his election for the academic title of associated professor in an unlawful manner.

12. On 30 June 2009, at the Senate meeting of the UP, Dr. Enver Hasani, by way of misusing the responsibilities as former Rector of UP, managed to be elected for the academic title of Regular Professor in "International Public Law" at the Law Faculty of the UP in an unlawful manner. Based on the provisions of the statute of the UP and the Law on Higher Education in Kosovo, Dr. Enver Hasani could not be elected for this academic title due to the following reasons:

    a. The 4 years period had not elapsed since his last election in 2006 for the academic title of associated professor (Article 182, 183, 184 and the Statute of University of Pristina);

b. There was no professional or scientific paper to be assessed as "professional or scientific contribution" which would enable the premature election for the academic title based on merits and success achieved;

c. During 2008 and 2009, there was no competition for the selection of a professor in the field of International Public Law at the Law Faculty of the UP;

d. The Professors' Council of the Law Faculty did not establish a review commission which would be responsible to assess whether the potential candidates meet the conditions foreseen in the Law on Higher Education and the Statute of the UP for the promotion to an academic title. As a result, in 2008-2009 no assessment report was drafted which would indicate whether it was Dr. Enver Hasani or some other candidate who would deserve to receive the academic title of regular professor in "International Public Law" at the Law Faculty (based on Article 180 and 181 item 5. of the statute of the UP);

e. During 2008-2009 the Professors' Council of the Law Faculty did not review any report of the review commission in order to see whether the legal conditions were met for Dr. Enver Hasani or any other candidate to be awarded the academic title of regular professor in "International Public Law' at the Faculty of Law as requested based on the public competition announced by the University of Pristina; and

f. In 2008-2009 the Professors' Council of the Faculty of Law of the UP did not propose to the Senate to select Dr. Enver Hasani for the academic title of regular professor in "International Public Law".

13. The Applicant further alleges that in May and June, 2009, all Faculties of the UP held elections for members of the Faculty Council, the presidency of faculties and the presidency of the UP. During these elections, Dr. Enver Hasani by misusing the responsibilities as the former Rector of the UP and by falsely pretending that he was employed at the Faculty of Law of the UP, managed to be elected as a member at the Law Faculty Council, although he was appointed as a professor with the academic title of associated professor at the Philosophical Faculty of the UP on 5 July 2006. Whereas only at the Faculty of Philosophy he could apply for member of the Professors' Council. Although without competition and without the proposal of the Law Faculty Council he was, in an unlawful manner, appointed professor at the Law Faculty.

14. In 2009, the Applicant allegedly raised these issues with the Council of the Faculty of Law, but no review took place for the reason that it did not deal with the past.

15. Finally, the Applicant state that "Filing of Cases against Enver Hasani in the Kosovo Courts is in vain because he exercises a powerful influence over judges, since he was a member of the Kosovo Judicial Council for a long time and a member of the Commission for interviewing and nomination of judges and Prosecutors of Kosovo".

Assessment of the admissibility of the Referral

16. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

17. In this respect, article 113.7 of the Constitution states:

    "Individual persons 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. Furthermore, article 48 of the Law states:

    "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. For the purposes of the Constitution, a victim is a natural or legal person (see case of AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Case No. KI. 41 /09) whose Constitutional Rights are personally or directly affected by a measure or act of a Public Authority. A person who is not affected in this manner does not have standing as a victim since the Constitution does not provide for actio popularis. In other words, an Applicant cannot complain in the abstract about measures by public authorities which have not been applied to them personally, such as is the case before this Court.

20. In the present case, the Applicant has not presented that he has been directly and currently violated by a public authority in his/her rights and freedoms guaranteed by the Constitution (see Vanek v. Slovak Republic, ECHR Decision as to Admissibility of Application no. 53363/99 of 31 May 2005).

21. It follows that the Applicant is not an authorized party and the Referral must be rejected as Inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously, in its session of 22 December 2010:

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. 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.

III. This Decision is effective immediately.

Judge Rapporteur	**Deputy President of the Constitutional Court**
Ivan Čukalovič, signed	Mr. sc. Kadri Kryeziu, signed

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