



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

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Pristina, 21 March 2011  
Ref. No.: RK101/11

## **RESOLUTION ON INADMISSIBILITY**

**Case No. KI 72/10**

Applicant

**AGEF Gmbh through duly authorized representatives**

**Constitutional Review of  
the Decision of the Municipal Assembly of Prishtina No. 353-1297, dated 29  
June 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 the NGO AGEF Gmbh, registered on 12 June 2000 to operate in Kosovo, registration no. 5300232-3, which submitted the referral through its duly authorized representatives, Mrs. Iliriana Osmani Serrecci and Mr. Virtyt Ibrahimaga from Prishtina.

### **Challenged decision**

2. The challenged decision is the Decision on the annulment of the Decision granting temporary use of the building of the municipal archive to the German Academy (school) for Adults (AGEF) 01. No. 353-1774, dated 24 September 2002. Challenged decisions are: Decision of the Supreme Court of Kosovo rev. 395/2008, dated 2 June 2009, and the Decision of the District Court in the municipality of Peja, Ac. No. 306/06, dated 25 May 2008.

### **Subject matter**

3. The subject matter of the case submitted with the Constitutional Court of the Republic of Kosovo on 30 July 2010 is the assessment of the Decision of the Municipal Assembly of Prishtina, 01 No. 353-1297, dated 29 June 2010, annulling the Decision granting temporary use of the building of the municipal archive to the German Academy (school) for Adults (AGEF) 01. No. 353-1774, dated 24 September 2002, requesting the Constitutional Court to impose interim measures cancelling the execution of the Decision of Prishtina MA, **01 No. 353-1297, dated 29 June 2010.**

### **Alleged violations of the rights guaranteed by the Constitution**

4. The applicant claims that the Decision of the Municipal Assembly of Prishtina has violated his constitutional right to effective legal remedies (Article 32 of the Constitution) and Article 22.3 of the Constitution as read with Article 1 of the Protocol 1 (1) of the European Convention on Human (every or legal person is entitled to the peaceful enjoyment of his possessions).

### **Legal basis**

5. Article 113 (7) and 116.2 of the Constitution, Articles 48 and 49 of the Law on the Constitutional Court of the Republic Kosovo, of 16 December 2008 (No. 03/L-121), (hereinafter referred to as: the Law), and Article 54 (b) and Article 69 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**

6. The applicant filed the referral with the Constitutional Court on 30 July 2010.
7. On 2 August 2010, the Constitutional Court notified the I.O.T. Bar Office, which represents the applicant, that the Constitutional Court has received their referral and registered it with number 72/10.
8. On 2 August 2010, the Constitutional Court notified the municipality of Prishtina as an opposing party, regarding the registered referral and asked the municipality for possible comments regarding the referral.
9. On 1 October 2010, the Constitutional Court sent a request to the Municipal Court of Prishtina for access to the case file C. no. 1679/2010, since it was aware that this case had the same subject matter as the case before the Constitutional Court of Kosovo.
10. On 10 August 2010 and on 15 September 2010, the municipality of Prishtina sent its comments regarding the case defending its decision as based on law.

11. On 14 December 2010, after having considered the Report of the Judge Rapporteur Ivan Čukalović, the Review Panel, composed of judges Robert Carolan (presiding) and Snezhana Botusharova and Altay Suroy, members, recommended the full Court to reject the Referral as inadmissible.

### **Applicant's complaint**

12. The Applicant complains that the Municipal Assembly of Prishtina with Decision 01 No. 353-1297, dated 29 June 2010, unconstitutionally and unlawfully annulled its Decision 01. No. 353-1774, dated 24 September 2002, and thus unilaterally terminated the Contract on the use of the building and the plot, drafted on 3 October 2002, according to which AGEF, as a contracting party, has been using the building, which is the subject matter of the contract, for 10 years, in conformity with conditions set forth in the contract.

### **Summary of the facts**

13. On 24 September 2002, the Municipal Assembly of Prishtina issued Decision 01. No. 353-1774, granting temporary use of the building of the municipal archive to the German Academy (school) for Adults (AGEF). Item III (three) of this Decision underlines that conditions of granting temporary use of the building shall be determined by a special contract, which is to be concluded between the municipality and AGEF.
14. On 3 October 2010, the Municipal Assembly of Prishtina, represented by the President of the Assembly, Mr. Salih Gashi, in the capacity of the owner, and the NGO AGEF, represented by dr. Karin Lutze, in the capacity of the user, concluded the contract regarding the use of the building of the municipal archive in Prishtina, at Andrea Gropa Street, cadastral plot 5941/5942, municipality of Prishtina.
15. Article 3 (three) of the Contract provides that the owner shall lend the building, which is the subject matter of this contract, to the user for a period of 10 (ten) years.
16. At the meeting held on 24 June 2010, the Municipal Assembly of Prishtina issued the decision, registered in the protocol with number 01 No. 353-1297, annulling the Decision granting temporary use of the building of the municipal archive to the German Academy (school) for Adults (AGEF) 01. No. 353-1774, dated 24 September 2002, with a remark on item VI (six) of the Decision that this decision enters into force from the day of approval in the Municipal Assembly, whereas in conformity with item III of this decision, AGEF should vacate the building it has been using within 30 days from the issuance of this decision.
17. On 7 July 2010, Prishtina MA, through its Department of Finance and Property, officially notified AGEF about its decision.
18. On 22 July 2010, AGEF GmbH, through its duly authorized representative, the lawyer Avdi Ahmetaj, from Prishtina, submitted a REFERRAL with the Municipal Court of Prishtina for the imposition of INTERIM MEASURES cancelling the execution of the Decision of the Prishtina MA, 01 No. 353-1297, dated 29 June 2010.
19. Municipal Court of Prishtina, deciding pursuant to AGEF referral, dated 4 August 2010, issued Judgment C. no. 1679/10, imposing temporary security measures and prohibits Prishtina MA to execute Decision 01 No. 353-1297, dated 29 June 2010, obliging at the same time the proposer (AGEF) to file a lawsuit within 30 days from the day of the approval of temporary security measures, against the objectors of security measures for

the issue, which is the subject matter of the referral, for the imposition of temporary security measures.

20. On 1 October 2010, the Constitutional Court directly submitted the Referral, Ref. no. 1442/10 DRLSA, to the Municipal Court of Prishtina for access to the case file C. 1679/2010, which relates to the case being reviewed at the Constitutional Court, and it immediately received from the Municipal Court the copy of the lawsuit C.no.1679, from which it can be clearly seen that AGEF, through its representative, the lawyer Selim Nikçi, in the capacity of the plaintiff, filed a lawsuit against the municipality of Prishtina for the confirmation of the existence of the contract, dispute value €3.500.00.

### **Assessment of admissibility of the referral on interim measures and the meritum**

#### **Interim measures**

21. In order to be able to adjudicate the applicant's referral, the Court needs to preliminarily assess if the applicant has fulfilled admissibility requirements laid down in the Constitution.

22. In this connection, the Court refers to Article 116.2 of the Constitution, which provides:

*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.*

And Article 27 of the Law on the Constitutional Court, which provides:

*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.*

The Court also bears in mind Article 51, paragraph 2 of the Rules of Procedure of the Constitutional Court, which provides:

*The request shall specify the reasons for requesting interim measures, the possible consequences if it is not granted, and the measures requested.*

23. From the abovementioned norms, it appears that the essential condition for the imposition of interim measures is the **irreparable (uncompensated)** damage that could be caused to the applicant and the protection of the **public interest**. It is also the obligation of the applicant to argumentatively justify his referral for the imposition of interim measures.
24. Considering allegations in AGEF Referral, the Court holds that the applicant did not submit evidence that would make the imposition of interim measures necessary. The applicant did not emphasize what irreparable damage would be caused to him if interim measures were not imposed and the reason why that damage could not be avoided, even through court's final decision. The applicant did not stress either how **public interest** was damaged by Prishtina MA decision and how this interest could be protected through court's possible interim measure.

25. Even if the applicant had sufficiently indicated the existence of the danger for irreparable damage caused to him by the application of the Prishtina MA decision, this danger was avoided through the determination of INTERIM SECURITY MEASURES of the Municipal Court in Prishtina through Resolution C. no. 1679, dated 4 August 2010, and this measure is still in force, so that the Constitutional Court cannot determine interim measures for the case according to which interim measures have already been determined.
26. From the abovementioned reasons, the Court unanimously decides to reject the referral for interim measures.

### **Assessment of essential aspects of the referral**

27. By reviewing all arguments submitted by the parties to the case, the Court comes to the conclusion that the referral submitted with the Constitutional Court by AGEF's authorized representatives **is premature** and that it has not been submitted pursuant to Articles 113.1 and 113.7 of the Constitution of the Republic of Kosovo, because:
28. In the referral on the assessment of the constitutionality of Prishtina MA Decision, submitted with the Constitutional Court, authorized representatives of the NGO AGEF Gmbh claimed that the Decision of the Municipal Assembly of Prishtina 01 No. 353-1297, dated 29 June 2010, is a political act, it does not have the quality of the administrative act and as such it does not provide the possibility of using **legal remedies** to challenge it before competent authorities, even though this right is a judicial constitutional category, provided by Article 32 of the Constitution.
29. If the Court recognized applicant's allegations and took the stand that Prishtina MA Decision does not have the quality of the administrative act, but that it is a political decision, in that case, the Court should declare as political the Decision of the Municipal Assembly of Prishtina 01 No. 352-1774, dated 24 September 2002, through which the building, which is the subject matter of the dispute, was given to AGEF for temporary use, and which provided the obligation of reaching of the contract on the use of the building, and which determines rights and obligations of contracting parties.
30. Article 1, paragraph 4 of the Law on Administrative Procedure (No. 02/L-28), provides:
- The provisions of this Law shall not apply to the following forms of activities of the public administration bodies:
- a) administrative acts of regulatory character;
  - b) administrative acts pertaining the internal organization of the public administration bodies;
  - c) administrative acts issued by the public administration bodies within private transactions, to which the public administration is a party.
- Considering what was said above, it appears that the challenged decision of Prishtina MA does not fall in any of the mentioned categories, it was therefore issued in the administrative procedure and it can be challenged through the administrative procedure.
31. So even assuming that the administrative contest could not have been initiated, the Court considers that Article 82, paragraph 1 of the Law on Local Self-Government (Law 03/L-

040) provides the possibility of challenging Municipal Assembly decisions within the competent Ministry of Local Self-Government.

32. NGO AGEF filed a lawsuit through its lawyer, Mr. Selim Nikçi, with the Municipal Court in Prishtina for the confirmation of the existence of the contract it previously concluded with Prishtina MA and which is the consequence of Prishtina MA Decision 01 No. 353-1774, dated 24 September 2002, and this procedure is ongoing.

33. Referring 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."*

Based on above, the Court concludes that it cannot consider a referral before all legal remedies at disposal have been exhausted, and it is clear that this did not happen in the actual case.

34. Moreover, 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 Kosovo will provide effective legal remedies for the protection of the violation of constitutional rights (see, *mutatis mutandis*, ECHR, Selmouni vs. France, no. 25803/94, Decision of 28 July 1999).

35. The Court also emphasizes simply that any doubt regarding the perspective of the issue is not sufficient to exclude one complainant from his/her obligation to appeal to local competent authorities (see *Whiteside vs. the United Kingdom*, Decision of 7 March 1994, App. No. 20357/92, DR 76, p. 80).

36. Consequently, the applicant has not met the requirements for the admissibility of the Referral, so

### FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution of the Republic of Kosovo, Article 49 of the Law on the Constitutional Court and Rule 56 (2) of the Rules of Procedure, on 14 December 2010 unanimously,

### DECIDES

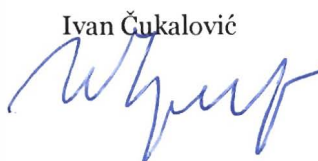
I. TO REJECT the referral as inadmissible;

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.

This Decision is effective immediately.

**Judge Rapporteur**

Ivan Čukalović



**President of the Constitutional Court**

Prof. Dr. Enver Hasani