



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE

УСТАВНИ СУД

CONSTITUTIONAL COURT

Prishtina, on 6 June 2018
Ref. no.: RK 1245/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI90/17

Applicant

“Elektromotori Sh. A.”

**Constitutional review of Decision AC-I-17-0204 of the Appellate Panel of
the Special Chamber of the Supreme Court of Kosovo, of 6 July 2017**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by “Elektromotori Sh.A.” with seat in Gjakova, which is represented by a lawyer Idriz Daci from Gjakova.

Challenged decision

2. The Applicant challenges Decision AC-I-17-0204 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 6 July 2017 (hereinafter: the Appellate Panel of the SCSC) , which was served on the Applicant on 15 July 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant's right guaranteed by Articles 46 [Protection of Property], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 21.4 [General Principles] and 113.7 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 4 August 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 7 August 2017, the President of the Court by Decision No. GJR. KI90/17 appointed Judge Selvete Gerxhaliu - Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.
7. On 9 August 2017, the Applicant completed referral form and submitted additional documentation to the Court.
8. On 23 August 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Appellate Panel of the SCSC.
9. On 12 March 2018, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 27 March 2017, the Applicant filed a claim with the Specialized Panel of the Special Chamber of the Supreme Court (hereinafter: the Specialized Panel of the SCSC) for the confirmation of ownership over the parcel of land which is registered in the cadastral plot 5019/2 in the Municipality of Gjakova.

11. The Applicant in the claim also requested to issue of a preliminary injunction (PI-interim measure) by which requested the Specialized Panel of the SCSC the prohibition of sale of the disputed property by the Privatization Agency of Kosovo (PAK) until the final decision regarding the claim.
12. The Applicant claimed that he is the owner of the disputed property, and as an evidence, along with the claim, attached several administrative decisions of the Municipality of Gjakova of 1985; 1986 and 1989 by which the municipality allowed it to build a kindergarten for the children of its workers in the disputed property. The Applicant claims that he has used that property in good faith for more than 20 (twenty) years, therefore he acquired the property right based the acquisition by prescription.
13. In February 2017 and April 2017, the PAK, through the sale procedure with liquidation of assets of enterprises under its management, among many other properties publicly offered for sale the property claimed by the Applicant.
14. On 21 April 2017, the Specialized Panel of the SCSC, by Decision C-III-17-0070, rejected the Applicant's request for imposition of interim measure.
15. On 10 May 2017, the Applicant filed an appeal with the Appellate Panel, requesting that the appealed decision be modified and interim measures be granted.
16. On 6 July 2017, the Appellate Panel of the SCSC, by Decision AC-I-17-0204, rejected the appeal of the Applicant and upheld the Decision of the Specialized Panel, which rejected the request for interim measure.

Applicant's allegations

17. The Applicant alleges that Decision AC-I-17-0204 of the Appellate Panel of the SCSC of the Supreme Court violates its rights guaranteed by Article 46 [Protection of Property] of the Constitution.
18. Regarding the alleged violations of Article 46 of the Constitution, the Applicant alleges that he submitted evidence which undeniably confirm that the cadastral parcel that is in the dispute, has been used in an unhindered way since 1986, therefore, according to Article 40 of Law No. 03/L-154 on Property and Other Real Rights, it has acquired the ownership over that property by prescription.
19. Finally, the Applicant requests the Constitutional Court to approve the Referral as admissible and to declare a violation of Article 46 [Protection of Property], to annul the challenged decision of the Supreme Court, by remanding the case for retrial.

Admissibility of Referral

20. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in Law and the Rules of Procedure.

21. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish that:

“1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

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.”

22. The Court also refers to Article 21, paragraph 4 [General Principles] of the Constitution, which establishes: *“4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable”*.
23. The Court further assesses whether the Applicant has met the admissibility criteria, as further specified in the Law and the Rules of Procedure. In this respect, the Court first refers to Article 48 [Accuracy of Referral] of the Law, which foresees:

Article 48 Accuracy of the Referral

“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 challenged.”

24. Regarding the fulfillment of these requirements, the Court notes that the Applicant is an authorized party which challenges an act of a public authority, namely Decision AC-I-17-0204 of the Appellate Panel of SCSC of 6 July 2017, after the exhaustion of all legal remedies provided by law at this stage of the judicial proceedings. The Applicant has also accurately specified the rights guaranteed by the Constitution and the Convention, which allegedly have been violated in accordance with Article 48 of the Law, and submitted the Referral within the 4 (four) month time period foreseen in Article 49 of the Law.
25. In addition, the Court has to examine whether the Applicant has fulfilled the admissibility requirements set out in Rule 36 [Admissibility Criteria] of the Rules of Procedure.

26. Rule 36 (1) of the Rules of Procedure specifies the requirements under which the Court may consider a Referral, including the requirement that such a Referral is not manifestly ill-founded. Rule 36 (2) provides:

“(1) The Court may consider a referral if:

[...]

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

(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights.

d) the Applicant does not sufficiently substantiate his claim.”

27. Based on the foregoing, the Court recalls that the Applicant challenges the Decision AC-I-17-0204 of the Appellate Panel of the SCSC of 6 July 2017, claiming that by failing to apply the interim measure which would prohibit the sale of the contested property, his constitutional right to property has been violated.

As to the alleged violation of the right to protection of property

28. The Court first recalls the content of Article 46 [Protection of Property] of the Constitution:

“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.”

[...]

29. The Court recalls that under Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is required to interpret the human rights and freedoms guaranteed by the Constitution in accordance with the case law of the European Court of Human Rights (ECtHR). Consequently, when assessing and interpreting allegations of a violation of Article 46 of the Constitution, the Court refers to the ECHR case law, namely the respective Article of the European Convention on Human Rights (ECHR) relating to the property rights

- Article 1, Protocol No. 1 of the Convention. The Court also refers to its own case law in relation to requests claiming the right to property.

30. In this regard, the Court emphasizes the content of Article 1 of Protocol 1 to the ECHR, which establishes:

*“Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
[...].”*

A. General principles regarding the right to protection of property

31. The Court reiterates the general principles laid down by the case law of the ECHR under Article 1 of Protocol No. 1, which are applicable also by Article 46 of the Constitution and explain the scope of protection of the right to property (see *Kopecký v. Slovakia*, paragraph 35, of the ECHR Judgment of 28 September 2004, *MALTZAN (FREIHERR VON) and others v. Germany*, paragraph 74 ECHR decision on admissibility of 2 March 2005).

32. General principles are as it follows:

a) Deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of “*deprivation of a right*” (see *Malhous v. the Czech Republic*, ECtHR Judgment, of 12 July 2001).

b) Article 1 of Protocol No. 1 does not guarantee the right to acquisition of property (see *Van der Mussele v. Belgium*, paragraph 48, ECHR Judgment of 23 November 1983, and *Slivenko and others v. Lithuania*, paragraph 121 ECtHR Judgment of 9 October 2003).

c) The Applicant may allege a violation of Article 1 of Protocol No. 1 only in so far as the challenged decisions relate to his “*possessions*” within the meaning of this provision “*possessions*” can be “*existing possessions*”, including claims, in respect of which an applicant can argue that he has at least a “*legitimate expectation*” that he will acquire an effective enjoyment of any right of the same property. On the other hand, the hope that a long-extinguished property right may be revived cannot be regarded as a “*possession*” within the meaning of Article 1 of Protocol No. 1; nor can a conditional claim which has lapsed as a result of the failure to fulfill the condition. (see *Prince Hans-Adam II of Liechtenstein v. Germany*, paragraphs 82 - 83, ECHR Judgment of 12 July 2001, and *Gratzinger and Gratzingerova v. Czech Republic* paragraph 69, ECHR decision on admissibility of 10 July 2002).

d) No “*legitimate expectation*” can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant’s submissions are subsequently rejected by the national courts

(see *Kopecký v. Slovakia*, paragraph 50 of the Judgment of the ECtHR, of 28 September 2004).

B. Application of abovementioned principles to the present case

33. In the present case, the Court notes that the Applicant is not the property right holder; on the contrary, he tried to acquire a property by initiating a court dispute at the Specialized Panel of the SCSC, meaning that the Applicant had only hope for the recognition of the property rights, therefore, such a real situation *"cannot be regarded as a "possession" within the meaning of Article 1 of Protocol No. 1."* (see, *inter alia*, Resolution on Inadmissibility of the Court, Case KI44/16 of 10 May 2017, Applicant *Biljana Topko*).
34. All Applicant's *"legitimate expectations"* that he will acquire the effective enjoyment of a property right were based on decisions of the Municipality of Gjakova in years 1985-86-87-89, by which he obtained the location and the permit of the construction of the kindergarten and permission for its encircling.
35. The Court notes that the Specialized Panel of the SCSC by Decision C-III-17-0070, when rejecting the Applicant's request for granting the interim measures, emphasized that *"the claimant did not provide reliable evidence that would reason the issuance of the PI. The claimant did not present any evidence on the existence of the risk of damage and further on he did not present any evidence that would argument that the immediate and irreparable damage would be caused if the PI would not be issued."*
36. Moreover, the Specialized Panel of the SCSC in the abovementioned decision stated that *"Based on the evidence presented by PAK, it can be concluded that the contested property is registered in the name of SOE - KBI "Erenik"... Therefore, the request for the issuance of the preliminary injunction does not meet the legal criteria as stipulated under Article 55.1 of the Annex" of the Law on Special Chamber (LSCh).*
37. The Court further notes that the Appellate Panel of the SCSC, by Decision AC-I-17-0204, of 6 July 2017, rejected the Applicant's appeal, upheld the Decision of the first instance court, by ascertaining:

"Therefore, based on these reasons, the conclusion of the Specialized Panel when it rejected the request for interim measure as ungrounded is correct since it correctly assessed that the legal terms based on Article 55.1 of the Annex to LSCh for imposing the interim measure have not been fulfilled".
38. The Court also finds that the Appellate Panel of the SCSC in its decision stated that *"This Decision does not in any way prejudice the resolution of the merits of the claim"*.
39. The Court in the circumstances of the present case when the Applicant challenges the decision not to apply the PI - interim measure and when the

case of the property right holder of the disputed property has not yet been resolved by a final court decision, recalls that the “*legitimate expectation*” of the property right cannot arise “*where there is a dispute as to the correct interpretation and application of domestic law.*” In addition, Article 46 of the Constitution and Article 1 of Protocol 1 of ECHR do not guarantee the right to acquisition of property.

40. Accordingly, the Court finds that the challenged decision of the Appellate Panel of SCSC did not violate Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR.
41. Therefore, the Court finds that the Applicant’s Referral is manifestly ill-founded on constitutional basis.

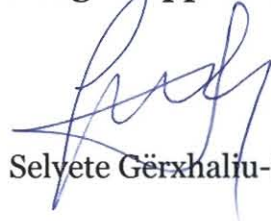
FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 48 of the Law, and in accordance with Rule 36 (1) (d) dhe (2) (b) dhe (d) of the Rules of Procedure, on 12 March 2018, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur



Selvet Gerxhalij-Krasniqi

President of the Constitutional Court



Arta Rama-Hajrizi