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

Prishtina, 13 May 2019
Ref. no.:RK 1361/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI94/18

Applicant

Miodrag Šešlija

Request for constitutional review of Judgment GSK-KPA-A-211/15 of the Supreme Court – of the Appellate Panel of the Kosovo Property Agency, of 21 February 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Miodrag Šešlija from Prishtina, with permanent address in Kragujevc, Republic of Serbia (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment GSK-KPA-A-211/15 of the Supreme Court - the Appellate Panel of the Kosovo Property Agency (hereinafter: the Appellate Panel of the KPA) of 21 February 2018, which was served on him on 23 March 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged decision and judgment, which allegedly violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as the rights guaranteed by Article 6 (Right to a fair trial) and Article 1 of Protocol no. 1 (Protection of property) of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 12 July 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.

7. On 16 August 2018, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Gresa Caka-Nimani and Safet Hoxha.

8. On 27 August 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Appellate Panel of the KPA.

9. On 10 April 2019, after considering the report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. The Applicant until 1999 lived in an apartment located in Dardania neighborhood in Prishtina.

11. In 1999, the Applicant left the apartment.

12. The Applicant in 2005, filed a claim with the Housing and Property Directorate (hereinafter: the HPD), requesting the restitution of the property rights over the apartment in which he lived until 1999. The HPD marked the Applicant's claim as C category claim, and registered it with the sign DS001562.

13. Person M.R. also submitted a claim to the HPD in 2005, requesting the restitution of the occupancy right over the same apartment as the Applicant. The HPD marked the claim of person M.R., as a category A claim, and registered it with the sign DS002602.

14. On 30 April 2005, the Housing and Property Claims Commissions (hereinafter: the HPCC), rendered the Decision HPCC/d/180/2005/A&C, which rejected the claim DS001562 of the person M.R., stating that "*the claim of the person of category A was rejected because it does not meet the requirements of UNMIK/REGULATION/1999/23 and section 2.2 of UNMIK/Regulation 2000/60*". The reasoning of the decision states:

> *„The Applicant with sign DS002602 received decision an allocation, entered into possession of the claimed property and signed a contract on use with the Public Housing Enterprise. However, he lost his property right not as a result of discrimination, but because he ceased to use the apartment for more than one year in contravention to Article 29.1 of the Law on Housing Relations."*

15. By the same decision, the HPCC acknowledged the repossession of the abovementioned apartment to the Applicant.

16. Person M.R. filed a request to the HPCC second instance authority, requesting the review of first instance decision HPCC/d/180/2005/A&C, of 30 April 2005.

17. On 26 March 2007, the HPCC upheld the request for review of the decision of the person M.R., and rendered decision HPCC/REC/94/2007. By this decision the property right of the mentioned apartment was restored to the person M.R. The reasoning of the decision reads:

> *„Person M.R., in the request for review of the decision, stated that was in the same firm for 15 years as the applicant, and that the relevant property was assigned to him accordingly. However, due to the imposition of the interim measure, he was dismissed from work and evicted from the property in question, and the then firm which was the holder of the right to dispose the said apartment decided to terminate his occupancy right. In the opinion of the HPCC, this was a discriminatory act. Accordingly, the HPCC is a category A claim of person M.R., registered with sign DS002602, and ordered that the property right be returned to the apartment in question."*

18. As regards the Applicant, the HPCC stated in the same decision:

„The Applicant of category A (person M.R.) with claim DS002602, is entitled to a restitution of property and to exercise his right to a restitution, he has to pay the amount under Section 4.2 (a) to the Directorate within 120 days from the day when the Commission renders a decision on the right to restitution.

If the Applicant of category A (person M.R), by claim DS002602, pays the amount from the previous paragraph, the Commission will give the final order to assign ownership of the property. The Applicant of the C category of claim DS001562 (the Applicant) will then be entitled, after submitting the request on compensation for his damage, which will be paid from the amount paid by the Applicant of A category in accordance with section 4.2 (c) of UNMIK/Regulation /2000/60".

19. On 23 November 2007, the Applicant filed a claim with the Kosovo Property Agency (hereinafter: the KPA) requesting confirmation of the right to use the immovable property. In the claim, the Applicant stated that he was the owner of the apartment in question, that the apartment was occupied by M.R., and in the name of usurpation be paid the compensation for the unauthorized use of the apartment.

20. On 7 October 2008, person M.R. addressed the KPA, stating that the apartment in question has already been allocated to him by the HPCC decision.

21. On 18 June 2014, the KPCC rendered Decision KPCC/D/A/247/2014, rejecting the Applicant's claim. The reasoning of the decision states: *"[...] the evidence submitted by the parties to proceedings, and which were verified by the Executive Secretariat have shown that the case was decided by a final decision and based on the provisions of the section 11.4 of the UNMIK Regulation 2006/50, as amended by the Law No 03/L-079, the the claim must be dismissed, because it has been previously decided."*

22. On 17 June 2015, the Applicant filed an appeal with the Appellate Panel of the KPA against the decision of the KPCC of 18 June 2014, stating that *„[...] he disagreed with the KPCC decision that it was not competent to deal with the case, because the matter has already been decided"*. The Applicant alleges that in 2007 he filed a claim for the recognition of the property rights over the said property and that the claim was not the same as the previous claim on which the courts had already decided.

23. On 21 February 2018, the Appellate Panel of the KPA rendered Judgment GSK-KPA-A-211/15, rejecting the Applicant's appeal as ungrounded. The reasoning of the judgment reads:

"Based on Article 2.7 of UNMIK Regulation No. 1999/23 the following is provided: Final decisions of the Kosovo Property Claims Commission are binding and enforceable, and are not subject to review by any other judicial or administrative authority in Kosovo". Therefore, the KPCC Decision to consider the case as decided by a final decision is based on the Law and well-reasoned."

Applicant's allegations

24. At the outset, the Applicant in the Referral alleges that in 2005 he filed a claim for repossession with the HPD and that in 2007 he filed a second claim in which he requested the confirmation of the right to use the immovable property and that, the position of the KPCC and of the Appellate Panel of the KPA, that this claim has already been decided in the previous proceedings, is erroneous.

25. The Applicant alleges that the KPCC and the Appellate Panel of the KPA have erroneously interpreted and applied the provisions of Article 11.4 of UNMIK Regulation No. 2006/50, and that, therefore, they could not take into consideration his arguments and evidence he had submitted and presented, by which he proves that he was entitled to the right to the said property.

26. The Applicant further alleges that such a position of the KPCC and of the Appellate Panel of the KPA violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution as well as the rights provided by Article 6 (Right to fair trial) and Article 1 of Protocol no. 1 (Protection of Property) of the ECHR.

27. The Applicant requests the Court to restitute the said property to his possession, or to be paid a fair compensation at the market value of the property.

Admissibility of the Referral

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

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

> *„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."*

30. The Court further examines whether the Applicant fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Article 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

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 challenge".

Article 49 [Deadlines]

„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..."

31. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraph (2) of the Rules of Procedure, which stipulates:

"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

32. Regarding the fulfillment of these requirements, the Court notes that the Applicant submitted the Referral as an authorized party, challenging an act of a public authority, namely Judgment GSK-KPA-A-211/15 of the Appellate Panel of the KPA, after exhaustion of all legal remedies. The Applicant also clarified the rights and freedoms he claims to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines of Article 49 of the Law.

33. At the beginning of the analysis of the grounds of the Applicant's allegations of violation of the constitutional rights and the rights guaranteed by the ECHR, the Court notes that the Applicant has conducted two court proceedings relating to the immovable property concerned and both court proceedings have been completed by the relevant decisions and judgments.

34. As to the first court proceedings, the Court finds that it started in 2005 and was completed on 26 March 2007, when the subject of the Applicant's dispute was resolved by the final decision HPCC/REC/94/2007. By the same decision, the Applicant was recognized one aspect of the property in the form of compensation, which he could exercise as an Applicant of the C category in accordance with Article 4 of UNMIK Regulation 2000/60.

35. The Court further notes that the Applicant commenced the second court proceeding on 23 November 2007, when he filed the claim with the KPA requesting confirmation of the right to use the immovable property, namely the apartment, the Court concludes that the second court proceeding was completed on 21 February 2018, by Judgment GSK-KPA-A-211/15 of the Appellate Panel of KPA, which rejected the Applicant's appeal as ungrounded.

36. In this regard, the Court will examine the Applicant's allegations of alleged violations of Articles 31 and 46 of the Constitution, in conjunction with Article 6 of the ECHR and Article 1 of Protocol No. 1 of the ECHR, exclusively in connection with the second court proceeding, as it is stated by the Applicant.

37. Accordingly, the Court first of all notes that the Applicant considers that the KPCC and the Appellate Panel of the KPA, violated his rights guaranteed by the Constitution and the ECHR, because they made a mistake and did not correctly interpreted UNMIK Regulation 2006/50, namely Article 11.4, which resulted in conclusion that this case has already been decided and that a final decision is rendered accordingly. In the opinion of the Applicant, it made impossible for them to consider the evidence by which he proves that the said property belongs to him.

38. In this regard, the Court finds that the Applicant's allegations of alleged violations primarily relate to the erroneously determined factual situation and erroneous application and interpretation of the substantive law, namely Article 11.4 of UNMIK Regulation 2006/50.

39. The Court reiterates that it is not its task to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). The Court may not itself assess the facts that draw hypotheses which have led the regular courts to that point to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "fourth instance", which would be to disregard the basis of the subsidiarity principle and limits established in the Constitution regarding its jurisdiction.

40. In fact, it is the role of regular courts is to interpret and apply the relevant rules of procedural and substantive law (see: case *García Ruiz v. Spain*, ECtHR, No. 30544/96 of 21 January 1999, paragraph 28 and see also the case: KI70/11, applicants: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011).

41. The Constitutional Court is obliged by constitutional competences to assess and decide on alleged violations of fundamental rights and freedoms guaranteed by the Constitution. Thus, the Court assesses whether the manner in which the regular courts applied the law was manifestly erroneous or otherwise arbitrary or discriminatory. (See, for example, ECtHR cases *Koshoglu v. Bulgaria*, Judgment of 10 May 2007, No. 48191/99; *Anheuser-BuschInc. v. Portugal*, Judgment of 11. January 2007, No. 73049/01, *Kuznetsov and others v. Russia*, Judgment of 11 January 2007, No. 184/02, *Khamidov v. Russia*, Judgment of 15 November 2007, No. 72118/01, *Andelković v. Serbia*, Judgment of 9 April 2013, No. 1401/08, *Dulaurens v. France*, Judgment of 21 March 2000, No. 34553/97).

42. The Court, having in mind that the Applicant claims that the regular courts have manifestly made a mistake and arbitrary application of Article 11.4 of UNMIK Regulation 2006/50, when they rejected his claim for confirmation of the right to use the property in question, finds that KPCC rejected the Applicant's claim for purely procedural reasons, without entering the very essence of the claim that referred to the said immovable property.

43. The Court notes that such a position was taken by the KPCC based on Article 11.4 of UNMIK Regulation No. 2006/50, which reads:

„The Commission shall dismiss the whole or part of the claim where [...]

c) The claim has previously been considered and decided in a final administrative or judicial decision."

44. Furthermore, the Court notes that the same conclusion was also reached by the Appellate Panel of the KPA in its Judgment GSK-KPA-A-211/15, responding to the Applicant's appealing allegations.

45. The Court also notes that such views of the KPCC and of the Appellate Panel of the KPA were taken on the basis of the first court proceedings commenced by the Applicant in 2005 and ended in 2007, which resulted in a final judgment in the case of property in question.

46. Based on the foregoing, the Court does not find the Applicant's allegation of erroneous application and interpretation of Article 11.4 of UNMIK Regulation 2006/50, as grounded.

47. In these circumstances, the Court considers that nothing in the case presented by the Applicant shows that the proceedings before the KPCC and the Appellate Panel of the KPA were unfair or arbitrary for the Constitutional Court to be satisfied that the core of the right to a fair and impartial trial has been violated or that the Applicant was denied any procedural guarantees, which would lead to a violation of that right under Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR.

48. In addition, the Applicant alleges that the challenged decision of KPCC and the Judgment of the Appellate Panel of the KPA also violate his rights to property under Article 46 of the Constitution and Article 1 of Protocol No. 1 of the ECHR.

49. With regard to these allegations, the Court points to the consistent case law of the ECtHR, according to which the "possessions" within the meaning of Article 1 of Protocol No. 1 of the ECHR may be either "existing possessions" or "assets", including claims in respect of which an applicant can argue that he has at least a "legitimate expectation" that they will be realised (see: ECtHR judgment, *Peter Gratzinger and Eva Gratzingerova v. Czech Republic*, decision on admissibility of 10 July 2002, application number 39794/98, paragraph 69).

50. In that regard, and with respect to the allegations of the Applicant, the Court emphasizes that, in the circumstances of the present case, the property in question cannot be regarded as "property: within the meaning of Article 1 of Protocol No. 1 of the ECHR because the necessary requirements were not fulfilled, namely, because on the said property it has already been decided during the first court proceedings by a final decision, which was confirmed in the KPCC decision, and in the judgment of the Appellate Panel of the KPA.

51. The Court further adds that the Applicant has not acquired the property in question within the meaning of Article 1 of Protocol No. 1 of the ECHR. However, based on Decision KPCC/D/A/247/2014 of KPCC, and Judgment GSK-KPA-A-211/15 of the Appellate Panel of the KPA, the Court notes that the Applicant has been recognized a form of *"adequate compensation for the property in question, which he can realize."*

52. In this regard, as underlined in the judgment of the Appellate Panel of the KPA, GSK-KPA-A-211/15 of 21 February 2018, when deciding on the court proceedings in relation to the said property, the Applicant's allegation of A category that he lost the property on the basis of the discriminatory legislation were upheld and, on this basis, the right to restitute the disputed property has been recognized to him, while the Applicant was recognized the right of adequate compensation, as provided for in Article 4 of UNMIK Regulation 2000/60.

53. In this respect, the Court finds the Applicant's allegations of violation of Article 46 of the Constitution and Article 1 of Protocol No.1 1 of the ECHR, as ungrounded.

54. In addition, the Court indicates that the Applicant did not provide relevant arguments to justify his allegations that in the second court proceedings in any way there has been a violation of the constitutional rights invoked by him, apart from the fact that he was dissatisfied with the outcome of the proceedings in which the challenged decision and judgment were rendered.

55. The Court reiterates that it is the Applicant's obligation to substantiate his constitutional allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR. That assessment is in compliance with the case law of the Court (see: case of the Constitutional Court No. K119/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Syla*, of 5 December 2013).

56. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and as such is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 paragraphs 1 and 7 of the Constitution, Article 47 of the Law and Rule 39 (2) of the Rules of Procedure, in the session held on 10 April 2019, 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	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

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