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

Prishtina, on 29 July 2019
No. ref.:RK 1402/19

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI18/19

Applicant

Non-governmental Organization "Association for Culture, Education and Schooling AKEA"

Constitutional review of Decision KSHA-OJQ/4-2018 of the Ministry of Public Administration of 25 September 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 the NGO "Association for Culture, Education and Schooling AKEA" (hereinafter: „NGO AKEA") (hereinafter: the Applicant). The Applicant, under the authorization of the President of the „NGO AKEA", is represented before the Court by lawyers, Arianit Koci and Nora H. Veliu from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Decision KSHA-OJQ/4-2018, of the Ministry of Public Administration (hereinafter: the MPA), of 25 September 2018.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision, which allegedly violates the rights and freedoms guaranteed by paragraph 2 of Article 24 [Equality Before the Law], Article 44 [Freedom of Association], paragraph 3 of Article 46 [Protection of Property] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 11 (Freedom of assembly and association), Article 14 (Prohibition of discrimination), as well as Article 1 of Protocol No. 1 (Protection of Property) of the European Convention on Human Rights (hereinafter: the ECHR).

4. The Applicant also requests the Court to impose interim measure, stating that *"the irreparable damage will be caused if the interim measure is not granted and that the imposition of the interim measure is in the public interest"*.

Legal basis

5. The Referral is based on Article 21.4 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 32 [Filing of Referrals and Replies] and 56 [Request for Interim Measures] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 1 February 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 6 February 2019, the President of the Court appointed Judge Selvete Gerxhaliu-Krasniqi, as Judge Rapporteur, and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

8. On 22 February 2019, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the MPA.

9. On 12 April 2019, the Court notified the Basic Court and the Court of Appeals about the registration of the Referral.

10. On 17 April 2019, the Applicant submitted a report to the Court with the recommendations of the Ombudsperson Institution.

11. On 20 June 2019, the Review Panel considered the Report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

12. On 9 December 2004, the Applicant ("NGO AKEA") was registered based on the applicable law at the time of the UNMIK Administration (No. 1999/22) in Kosovo. Based on the statute of the "NGO AKEA", the Court notes that it is registered to carry out the following activities:

> *"Promoting and preserving the cultural values of the citizens of Kosovo;*
> *Preservation and cultivation of human values based on humanity and mutual solidarity of citizens;*
> *Raising educational level of citizens in general and young generations in particular;*
> *Strengthening tolerance and understanding among citizens;*
> *Raising awareness of citizens about negative phenomena and their restraint;*
> *Engaging young people in cultural and educational activities;*
> *Building peace, tolerance and understanding among young people;*
> *Raising the voice against the endangering of civil values;*
> *Raising voice in protection against endangering the dignity of personality, family and society;*
> *Building and raising a healthy person, family and society;*
> *Working to help NGO development and promoting mutual cooperation among NGOs registered in Kosovo;*
> *Supporting development of democracy and civil society and any other activity that is in the function of the general good."*

13. On 11 December 2009, the Applicant ("NGO AKEA") completed again the registration with the Ministry of Public Administration of the Republic of Kosovo, pursuant to the new Law No. 03/L-134 on Freedom of Association in Non-Governmental Organizations, of 25 March 2009.

14. Based on the case file, it follows that the Applicant "NGO AKEA" performed its activities until 17 September 2014.

First decision of the MPA regarding the suspension of the activity of the Applicant

15. On 17 September 2014, the MPA rendered its first decision (Pos. on No. 06/207/2014), which suspends the activity of the "NGO AKEA".

16. In the reasoning of its decision, the MPA, *inter alia*, stated:

> *„The competent authority for security filed a request for suspension of the activities of the NGO "Association for Culture, Education and Schooling (AKEA)" with reg. number 5110087 - 1, registered on 09.12.2004, request under protocol no. 300 of 15.09.2014.*

Request for suspension of activities of the NGO "Association for Culture, Education and Schooling - (AKEA)" under registration number 511087 - 1 registered on 09.12.2004 is based on the information of the relevant security institutions that there is a reasonable doubt that the activity of the NGO "Association for Culture Education and Schooling (AKEA) does not coincide with the legal and constitutional order of the Republic of Kosovo and with international law, consequently, also violated the legal norms of the statute on the basis of which it is registered.

The decision to suspend the activity of this organization is valid until another decision is rendered".

17. The Court notes that the Applicant, in order to annul the first decision on suspension of the performance of the most important activities of the MPA (Pos. No. 06/207/2014), initiated several proceedings before the competent institution of the MPA and the regular courts.

18. In this regard, for the purpose of easier chronological following of factual situation, the Court will further present the facts in relation to all the actions separately, which the Applicant has taken to annul the MPA decisions on suspension of the activity.

Proceedings initiated by the Applicant before the MPA commission for reviewing the NGO complaints regarding the annulment of the first decision of MPA (Pos. No. 06/207/2014) of 17 September 2014

19. On 24 September 2014, the Applicant filed a complaint with the Commission for reviewing the NGO complaints, against the decision (Pos. No. 06/207/2014), of 17 September 2014.

20. On 23 October 2014, Commission for reviewing the NGO complaints rendered the decision [No. 2/14], which rejected the Applicant's complaint as ungrounded. The reasoning of the decision, *inter alia*, reads:

„By Decision, Pos. No. 06/270/2014 of the Department for NGOs was approved the request of the competent security authority No. 300 of 15.09.2014 on suspension of activities of the NGO "Association for Culture, Education and Schooling - AKEA."

After consideration of the complaint and other case files, the Commission for reviewing the NGO complaints ... rendered the decision on suspension of activities of the NGO "Association for Culture, Education and Schooling – AKEA."

First court proceedings initiated by the Applicant regarding the annulment of the first decision of the MPA (Pos. No. 06/207/2014) of 17 September 2014

21. On 18 November 2014, the Applicant filed a claim with the Basic Court against the MPA Decision (Pos. No. 06/270/2014), of 17 October 2014, and decision of

the Commission for Reviewing the NGO Complaints (No. 02/2014) of 23 October 2014.

Second decision of the MPA regarding the suspension of the Applicant's activity

22. On 23 October 2015, the MPA rendered second decision (Pos. No. 06/342/2015) which reads: *"deciding upon the request of the competent security authority for NGOs, a decision extending the suspension of the work of the "NGO AKEA" is rendered until another decision is made."*

Proceedings initiated by the Applicant before the MPA commission for reviewing NGO complaints regarding the annulment of the second decision of the MPA (Pos. No. 06/342/2015) of 23 October 2015

23. On 24 November 2015, the Applicant filed a complaint with the Commission for reviewing the NGO complaints, against the second decision of the MPA [Pos. No. 06/342/2015].

24. On 16 December 2015, the MPA Commission for reviewing the NGO complaints rendered the decision (No. KSHA-OJQ/5 -2015), rejecting, as ungrounded, the Applicant's complaint.

Third decision of the MPA in connection with the suspension of the Applicant's activity

25. On 8 November 2016, the MPA rendered the third decision [Pos. No. 06/470/2015], which extended the suspension of the Applicant's activity. The reasoning of the decision of the MPA, *inter alia*, states:

> *„Request for suspension of activities of the NGO "Association for Culture Education and Schooling (AKEA), registration no. 5110087 - 1 registered on 09.12.2004, is based on the information of the competent security institutions that there is a reasonable suspicion that the activity of the NGO "Association for Culture Education and Schooling" does not coincide with the legal and constitutional order of the Republic of Kosovo and the international law, and consequently, violated the legal norms of the statute on the basis of which is registered".*

Proceedings initiated by the commission for reviewing NGO complaints regarding the annulment of the third decision of the MPA (Pos. No. 06/470/2015), of 8 November 2016

26. On 24 November 2016, the Applicant filed an appeal with the commission for reviewing NGO complaints against the decision of the MPA [Pos. No. 06/470/2015], which states *„Nowhere in the law or in the Constitution, the right to suspend the activities of NGOs is emphasized, but only its prohibition by the competent court (Article 44.3 of the Constitution and Article 20, paragraph 1.4 LFANO). There is no mention of the competence of the state authority to suspend organizational activities, moreover, it violates the basic human right guaranteed by Article 44.1 participation in organizational*

activities. Accordingly, the decisions are based on unconstitutional acts and they are unconstitutional".

27. Based on the factual situation, the Court notes that the judicial proceedings initiated by the Applicant regarding the annulment of the second and third decisions of the MPA are finalized by the decisions of the MPA Commission for reviewing the NGO complaints.

Decisions of the regular courts upon the Applicant's first statement of claim of 18 November 2014

28. The Court will proceed in the report, with the factual situation regarding the court proceedings initiated by the Applicant before the regular courts concerning the annulment of the first decision of the MPA of 17 September 2014.

29. On 9 November 2017, the Basic Court rendered Judgment [A. No. 2345/2014] which approved the Applicant's statement of claim and annulled the MPA decision [No. 0/2014] of 23 October 2014, and remanded the case for reconsideration to the MPA. The reasoning of the judgment states:

> *„The challenged decision is legally unclear and contradictory with itself and with its reasoning. In its reasoning, the reasons for the decisive facts that led to the adoption of the challenged decision were not given. In the reasoning of the decision, a general and abstract formulation was provided indicating that the activity of the NGO "AKEA" was suspended with the justification that on the basis of the data of the case, it was noted that the organization AKEA performed activities contrary to the legal order and international law. However, the second instance body did not specify what activities were performed contrary to the legal and constitutional order, and whether it considered and assessed all alleged violations during the course of the activity and whether it was conducted in accordance with the legal provisions, assessing the evidence in which it has established decisive facts".*

30. On 18 January 2018, the Applicant filed appeal with the Court of Appeals against the judgment of the Basic Court of 9 November 2017, stating that the Basic Court did not render the decision on merits, did not enter the analysis of Article 18 of the Administrative Instruction on whether the institute of suspension of NGOs exists. The first instance court was to declare the challenged decisions void-absolutely invalid, unlawful and not based on law, because Law on NGOs 04/L-57 on the freedom of association in non-governmental organizations recognizes only the establishment and closure of a non-governmental organization, and not the suspension.

Fourth decision of the MPA regarding the suspension of the Applicant's activities

31. On 10 August 2018, the MPA rendered the fourth decision [Pos. No. 06-108/2018], which extended the suspension of the Applicant's activity. The reasoning of the decision reads:

„According to the competent security authority, on 8 August, 2018, on the suspension of the activities of the NGO "Association for Culture, Education and Schooling – AKEA" under the reg. no. 5110087 - 1 registered on 19.12.2004, the NGO/MPA Department decided to suspend the activity of the abovementioned organization. The request is based on the information of the competent institutions that this NGO is carrying out activities that are contrary to its goal and field of operation and that it is in conflict with the interests of the security of the Republic of Kosovo".

The continuation of court proceedings before the Court of Appeals in relation to the first Applicant's statement of claim of 18 November 2014

32. On 13 September 2018, the Court of Appeals rendered judgment [AA. No. 76/18], by which the Applicant's appeal was approved as grounded, and annulled the judgment of the Basic Court of 9 November 2017, while the case was remanded for retrial. The judgment of the Court of Appeals states:

„The enacting clause of the judgment must be clear, comprehensible and complete because it is part of the judgment from which it should be clearly seen how the competent court decided on the issue that was the subject of the process. It is understood from the enacting clause of the challenged judgment that the statement of claim is approved, but it cannot be understood why the first instance court wrote the authorized representatives of the claimant in the enacting clause of the judgment, complained of, because it is clearly understandable that the claimant in the present case the NGO "Association for Culture, Education and Schooling (AKEA) with its seat in Prishtina, whereas the enacting clause of the judgment implies that the court put as claimants also the claimant's representative. Thus, for the time being, this court cannot accept as fair the statement that is presented in the enacting clause of the judgment, complained of, since it has flaws due to which it cannot be implemented and is legally vague and unstable."

Proceedings initiated by the Applicant before the MPA commission for reviewing NGO complaints regarding the annulment of the fourth decision of the MPA (Pos. No. 06-108/2018) of 10 August 2018

33. On 18 September 2018, the Applicant filed an appeal with the Commission for reviewing the NGO complaints, against the MPA decision, of 10 August 2018.

34. On 19 September 2018, the Applicant submitted to the Ombudsperson Institution "*Request for opening the case of NGO „AKEA"* against the Ministry of Public Administration"

35. On 25 September 2018, the Commission for reviewing the NGO complaints, rendered the decision [No. 4-2018] which rejected the Applicant's appeal as unfounded. The reasoning of the decision reads:

"After presentation of evidence in accordance with Article 23 of the Law No. 04/L-57 on Freedom of Association in Non-Governmental

Organizations and Article 1 of Regulation No. 02/2012 of MPA on establishment and functioning of the Commission for reviewing the NGO complaints, *the Commission decided to reject the appeal*".

Second court proceedings initiated by the Applicant for annulment of the fourth decision of the MPA (Pos. No. 06-108/2018), of 10 August 2018

36. On 1 November 2018, the Applicant filed a request with the Basic Court to postpone the execution of the decision of the MPA (Pos. No. 06-108/2018), of 10 August 2018, until the Basic Court renders the judgment on merits according the instructions given by the Court of Appeals given in the judgment of 13 September 2018.

Continuation of the court proceedings in relation to the Applicant's first statement of claim of 18 November 2014

37. On 9 December 2018, the Basic Court, acting in accordance with the judgment of the Court of Appeals of 13 September 2018, rendered Judgment [A. No. 2369/2018], which approved the claim of the Applicant, annulled Decision [No. 02/2014] of 23 October 2014, and remanded the case for retrial to the MPA. The judgment of the Basic Court, among others, states:

"In retrial, taking as basis the data from the Court of Appeals, the Court rectified the enacting clause of the court decision in order to make the decision clear and enforceable, and in the reasoning of this decision the court gave its findings regarding the allegations of the litigants.

The court, based on the reasoning of the challenged decision, finds that the respondent did not consider the claimant's allegations that all the activities of the claimant were in compliance with the conditions of registration and in accordance with the legal norms of its status. In its decision, the respondent did not specify what activities the claimant did in contravention of the constitutional and legal order. The Court finds that the decision of the respondent contains essential violations of the provisions of Article 84, paragraph 2 of the Law 02/L-028, on the Administrative Procedure which provides that the administrative act should, inter alia, contain a summary of factual findings based on evidence submitted during the administrative proceeding or facts provided by the administration, determining the legal basis on which the act is based.

The abovementioned violations are such as to hinder the assessment of the legality of the challenged decision, and in that regard, the court obliges the respondent authority to act in the repeated proceedings in accordance with the remarks given in this judgment and subsequently rectify the abovementioned flaws, to render a fair decision based on the law".

Decisions of the regular courts regarding the second court proceedings initiated by the Applicant on 1 November 2018

38. On 10 December 2018, the Basic Court rendered the Decision [A. No. 2859/18], upon a request made by the applicant on 1 November 2018. The decision of the Basic Court reads: *"a supplement to the claim/proposal for postponing the execution of the decision is returned to the Applicant, for accurately indicating what decision is requested to be annulled, because in this proceeding the court considers the legality of only the final decision by the administrative procedure".*

39. On 19 December 2018, the Applicant submitted specified statement of claim-proposal to the basic Court, in which it requested the delay in the enforcement of the decision of the Commission for NGO complaints [No. 4-2018], of 25 September 2018.

40. On 4 January 2019, the Basic Court rendered decision [A. No. 2859/18], rejecting the Applicant's request for postponement of the execution of the decision of the Commission for the NGO complaints [No. 4-2018], of 25 September, 2018. The reasoning of the decision of the Basic Court reads:

> *"After considering the claimant's proposal to postpone the execution of the challenged decision, the Court finds that it did not present any fact based on any evidence capable of making its allegations credible, on how the execution of the challenged decision by the claim, is detrimental to it, the damage is difficult to repair and that the delay is not contrary to the public interest, this legal requirement should be proved by the claimant, so that the court can then decide on the postponement of the execution of the decision".*

41. On 30 January 2019, the Applicant filed an appeal with the Court of Appeals against the decision of the Basic Court [A. No. 2859/18], of 4 January 2019, in which, *inter alia* states *"that the execution of the challenged decision of the Commission for the NGO Complaints no. 4-2018 of 25 September 2018, will cause to the organization the irreparable damage, because, for the past 4 years, it was forbidden to operate. Similarly, TEB Bank, on the basis of the MIA request, requested the Organization to withdraw all funds from this bank account with the threat of closing the account, without having to wait for the final decision of the competent court".*

Proceedings before the non-judicial institution initiated by the Applicant on 1 February 2019

42. On 1 February 2019, the Applicant filed a request to the Ombudsperson Institution for the assessment of the constitutionality of the MPA decision of 25 September 2018, as well as of Article 18 of the Administrative Instruction GRK No. 02/2014 on the registration and functioning of non-governmental organizations, citing *"that in the period from 2014 onwards, the Ministry of Public Administration by its controversial decisions violated the constitutional rights and freedoms specified in the request, inter alia, the freedom of association under Article 44 of the Constitution, equality before*

the law under Article 24 (2) of the Constitution and protection of property referred to in Article 46 (3) of the Constitution".

43. On 1 April 2019, the Ombudsperson issued a Report with recommendations concerning the Applicant's appeal. In the report, the Ombudsperson found *"that to the entity which activity is suspended is violated the right to fair and impartial trial because of the delay of the case, established by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights (ECHR), the right to an effective remedy foreseen by Article 54 of the Constitution of the Republic Kosovo, as well as Article 13 of the ECHR".*

44. In addition, the Ombudsperson in his Report with recommendations, recommended the Government of the Republic of Kosovo *"To modify Administrative Instruction No. 02/2014 on Registration and Functioning of Non-governmental Organizations, adopted at the 195th session of the Government of Kosovo, by Decision No. 01/195 of 3.9.2014, namely deletion of Article 18".*

Applicant's allegations

45. The Applicant alleges that the arbitrary, unlawful and unconstitutional decisions of the MPA administrative body of 2014 continue, and more specifically the MPA fourth decision [MPA Ref. KSHA-OJQ/4-2018] of 25 September 2018 violate the freedom of association under Article 44 of the Constitution in conjunction with Article 11 of the ECHR.

46. The Applicant further alleges that the organization in the period from 2014 does not perform any of its activities because of the abovementioned decisions of the administrative body of the MPA, the activities of the organization are temporarily suspended for a period of one (1) year, on the grounds that they, according the request the competent security authority, these activities are contrary to the aim and scope of the organization's work and that, as such, they are contrary to the security interests of the Republic of Kosovo, by which Administrative Authority of the MPA violated Article 55 paragraph 1 of the Constitution, according to which, the rights and freedoms guaranteed by the Constitution can only be limited by law.

47. The Court notes that the Applicant, in order to justify his allegations of alleged violation of Article 44 and 55 of the Constitution and Article 11 of the ECHR, listed a number of decisions of the European Court of Human Rights (hereinafter: the ECtHR), including the judgment of the ECtHR *United Communist Party and Others v. Turkey*, application 133/1996/752/951, decision of 30 January 1998, and *Zhechev v. Bulgaria* application no. 57045/00, decision of 21 June 2007.

48. Furthermore, the Applicant alleges that the arbitrary, unlawful and unconstitutional decisions of the administrative body of the MPA of 2014 and onwards, and in particular the fourth MPA decision (MPA decision Ref. KSHA-OJQ/4-2018) of 25 September 2018 violate Article 24 paragraph 2 of the Constitution in conjunction with Article 14 of the ECHR.

49. Similarly, the Applicant claims that the challenged decision violates the right to peaceful enjoyment of property, guaranteed by Article 46.3 of the Constitution in conjunction with Article 1 of the Protocol 1. of the ECHR.

50. The Applicant in this section also refers to a number of ECtHR judgments, in order to build its allegations of violation of Article 24, paragraph 2 of the Constitution in conjunction with Article 14 of the ECHR, as well as violation of Article 46.3 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR.

51. The Applicant further states that he exhausted all legal remedies available in connection with the first MPA decision of 23 October 2014, which for the first time suspended the activity of the organization. However, on 20 November 2014, on the date when it filed the claim against the MPA, until 1 February 2019, the Basic Court in Prishtina has not yet rendered the judgment on merits regarding the legality of the MPA decision of 2014.

52. In this regard, the Applicant requests the Constitutional Court to consider the matter specified in this referral similar to its case-law in relation to cases: KI06/10; KI 11/09; KI 99/14 and KI 100/14 and in accordance with Article 54 of the Constitution, Article 13 of the ECHR and Article 2 of Protocol 4 to the ECHR.

Applicant's allegations regarding the request for imposition of interim measure

53. The Applicant requests the Court to impose an interim measure because it considers that *"it showed a "prima facie" case on the admissibility of the referral".*

54. The Applicant considers it would suffer unrecoverable damage if the interim measure is not granted, in this regard, the Applicant states:

> *„In the circumstances of the present case, the administrative body of the MPA by challenged decisions on the suspension of the activity of the organization in the period from 2014 until the present day, although the decisions were of a temporary nature, with each decision having the legal effect of the suspension of the activity of the organization in the period of only one (1) year, since such decisions have been constantly renewed for five (5) years in a row, they have produced a long-term and continuous effect that has led to the complete freezing of the activities of the organization, which is practically the same as its factual "extinguishing".*

55. The Applicant also considers that the interim measure is in the public interest, and in this context, the Applicant claims: *„...that the imposition of the interim measure in relation to the further application of Article 18 of the Administrative Instruction GRK No. 02/2014 on registration and functioning of non-governmental organizations and consequent imposition of interim measure in relation to execution of the decision of the Ministry of Public Administration Ref. KSHA-OJQ/4-2018 of 25.09.2018 is in the public interest*

of all civil society organizations, and not only in the personal interest of the Applicant".

56. The Court, having in mind all the allegations of the Applicant, finds that it in fact requires the Court to find a violation of its rights and freedoms guaranteed by Article 24 of the Constitution and Article 14 of the ECHR, since it does not have equal treatment by law, a violation of Article 44 of the Constitution and Article 11 of the ECHR, because the MPA decisions suspended its right to perform its activities, violation of the right to legal remedy under Article 13 of the ECHR, as the legal remedies it used in the proceedings led it to the decision on suspension, thereby violating the rights to property guaranteed by Article 46 of the Constitution of Article 1 of Protocol 1 to the ECHR.

Admissibility of the Referral

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

58. In this respect, the Court refers to Article 21 paragraph 4 [General Principles] and Article 113 paragraphs 1 and 7 [Jurisdiction and Authorized Parties] of the Constitution which establish:

Article 21 [General Principles]

„4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."

Article 113 [Jurisdiction and Authorized Parties]

"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."

59. At the outset, the Court notes that in accordance with Article 21.4 of the Constitution, the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms applicable both to individuals and to legal persons (case of the Constitutional Court No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph).

60. The Court further examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law and the Rules of Procedure. In this regard, the Court refers to Article 48 [Accuracy of the Referral], which stipulates:

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."*

61. As regards the fulfillment of this requirement, the Court notes that the Applicant has clearly emphasized the rights guaranteed by the Constitution and the ECHR, which were allegedly violated, as well as the specific act of the public authority which it challenges in accordance with Article 48 of the Law.

62. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraph (1) (b) of the Rules of Procedure, which stipulates:

> *"1. The Court may consider a referral as admissible if:*
>
> *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted."*

63. Having regard to the Applicant's allegations, the chronology of the activities it carried out, as well as the very substance of the referral, the Court found that it submitted the Referral to the Constitutional Court despite the fact that both proceedings (administrative and judicial), which it initiated in order to protect its constitutional rights and freedoms, it is still at the decision-making stage before the competent institutions and courts.

64. The Court also notes that the Applicant justified its action by the allegation *„that there is no effective legal remedies available to it to protect its constitutional rights"*, and accordingly requests the Constitutional Court to approve the referral and to enter the substance of the case, and to assess whether the previous proceedings of the MPA and of the regular courts have violated its rights and freedoms guaranteed by paragraph 2 of Article 24 [Equality Before the Law], Article 44 [Freedom of Association], paragraph 3 of Article 46 [Protection of Property] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, as well as Article 11 (Freedom of assembly and association), Article 14 (Prohibition of discrimination), as well as Article 1 of Protocol No. 1 (Protection of property) of the ECHR.

65. Taking into account the abovementioned constitutional provisions, the provisions of the Law and the rules of the Rules of Procedure, the Court should first of all examine whether the present Referral of the Applicant fulfills the admissibility requirements for the exhaustion of legal remedies.

66. In this regard, in order to answer the question whether the Applicant in the present case must meet the required formal requirements for the exhaustion of all legal remedies, or may be exempted from this obligation, the Court should consider the case law of the ECtHR and its case law, which established the basic principles and principles of exhaustion of legal remedies.

Concept of exhaustion of legal remedies

67. The Court notes that the concept of exhaustion or the obligation to exhaust legal remedies derives from and is based on the case law of the ECtHR, according to which "the purpose of the exhaustion of legal remedies is to provide regular courts with the opportunity to prevent or correct alleged violations of the Constitution. In the context of the ECtHR, this obligation is based on the assumption that an internal legal order provides an effective legal remedy for the protection of constitutional rights and rights under the ECHR, this is an important aspect of the subsidiary nature of the ECHR (see ECtHR judgment *Burden v. the United Kingdom*, Application No. 13378/05, of 29 April 2008, paragraph 42, onwards).

68. The Court also recalls that, in its previous case law, "*except for certain grounded and justified exceptions*", it adhered to those principles, and noted that the principle of subsidiarity requires the Applicants to exhaust all legal remedies, in the present case, all procedural possibilities in the regular proceedings in order to prevent violation of constitutional rights or to correct violations of constitutional rights and freedoms, if any (see, Resolution on Inadmissibility in case KI139/12 *Besnik Asllani*, constitutional review of the Judgment of the Supreme Court, paragraph 45, Resolution on Inadmissibility KI24/16, Applicant *Avdi Haziri constitutional review of the decision of the Supreme Court of Kosovo*).

69. The Court also adds that the case law of the ECtHR has also set exceptions to the application of the principle when an individual may be exempted from the obligation to exhaust regular legal remedies. In case *Akdivar v. Turkey* (application 21893/93, decision of 16 September 1996, para. 65-66), the ECtHR found that Applicants must exhaust only domestic legal remedies which are available, sufficient and effective. Likewise, the ECtHR concluded in Judgment *Van Ostervijk v. Belgium* that, in accordance with the general principles of international law, there may be special circumstances in which the Applicant is exempted from the obligation to exhaust previously all domestic legal remedies. (see judgment of the ECtHR *Van Ostervijk v. Belgium* of 6 November 1980, Series A No. 40, pp. 18 and 19, paragraphs 36 to 40).

70. The Court recalls that in its case law, the ECtHR pointed out that it falls to the Applicant to prove and show that the domestic legal remedy available to him was in fact exhausted or that the legal remedy was for some reasons inadequate and ineffective, or in particular, that there existed special circumstances why the Applicant in this case was not obliged to fulfill that requirement (see ECtHR judgment *Akdivar v. Turkey*, pp. 1211, para. 68).

71. The Court also wishes to point out that it had also in its long-standing practice the requests in which it concluded that the applicants in the "*given circumstances did everything*" regarding the exhaustion of legal remedies, and that the obligation of the exhaustion was fulfilled or the cases in which the applicants were "absolved" of the obligation of exhaustion of legal remedies, taking into account the specific nature of the case as well as the substance of the applicants' referral (see KI 56/09, *Fadil Hoxha and 59 others* vs. *the Municipal Assembly of Prizren*, judgment in case No. KI06/10 *Valon Bislimi v.*

the Ministry of Internal Affairs, Kosovo Judicial Council and the Ministry of Justice, Judgments in cases KI99/14 and KI100/14, Applicants *Shyqyri Syla and Laura Pula*).

72. In the light of the above, it follows that, first of all, the Court should determine whether the Applicant had, in the present case, available legal remedies prescribed by law, and through its use, it could protect its constitutional rights as required by the ECHR, before submitting his referral to the Constitutional Court.

The concept of the effectiveness of remedies in a present case

73. The Court notes from the Applicant's allegations that the Applicant considers that there is no purpose to pursue further judicial proceedings since they have not so far resulted in such a way as to enable him to find out the reasons for suspension of its activities, namely to obtain decisions on the merits of the claim.

74. In this regard, the Court further notes that the Applicant considers that there are no effective legal remedies available to it in order to protect its constitutional rights, which can be concluded also on the basis of the decisions of the regular courts. Accordingly, it requests the Constitutional Court to approve the referral and enter the substance of the case, and to assess whether the previous proceedings of the MPA and regular courts violated its rights and freedoms guaranteed by paragraph 2 of Article 24 [Equality Before the Law], Article 44 [Freedom of Association], paragraph 3 of Article 46 [Protection of Property] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, and Article 11 (Freedom of assembly and association), Article 14 (Prohibition of discrimination), as well as Article 1 of Protocol No. 1 (Protection of Property) of the ECHR.

75. In this regard, the Court recalls Article 32 [Right to Legal Remedies] of the Constitution, which in the relevant part reads:

> *"Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law."*

76. The Court also recalls Article 13 (Right to an effective remedy) of the ECHR, which reads in the relevant part:

> *"Everyone whose rights and freedoms as set forth in this 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".*

77. Having regard to the Applicant's allegations, the Court notes that the Applicant bases the rule of exhaustion of legal remedies on the assumption that there are no effective legal remedies available in relation to the alleged violation of its constitutional rights as well as the rights under the ECHR in further proceedings before the regular courts.

78. The Court recalls that, as far as the issue of legal remedies is concerned, the ECtHR has particularly underlined the fact that it falls to the state to provide legal remedies and to ensure all the necessary conditions for their application (see ECtHR Judgment *Vernillo v. France* of 20 February 1991, Series A, No. 198, pp. 11 and 12, para. 27).

79. In this regard, the Court, taking into account the case-law of the ECtHR, finds that by dealing with the issue of exhaustion of legal remedies established that, **a)** the existence of legal remedies must be prescribed by law, and they must be sufficiently certain, not only in theory, but also in practice, **b)** when determining whether a particular legal remedy meets the availability and effectiveness criteria, the specific circumstances of each individual case must also be taken into account; **c)** the Court must in real terms take into account not only the formal legal remedies available at the internal legal system, but must take into account the general legal and political context in which these legal remedies function, **d)** whether there existed some obstacles to the use of the legal remedy (see, the ECtHR Judgment *Akdivar and Others v. Turkey*, para. 68 -69, as well as the ECtHR Judgment *Khashiyev and Akayeva v. Russia*, para. 116-17).

80. In that regard, the Court, having regard to the principles and case law of the ECtHR, should in particular establish a) whether the remedy in the Applicant's case was prescribed by the applicable law, b) whether the legal remedy was available to the Applicant, c) whether this legal remedy was effective in practice, and d) whether there existed some obstacles and special circumstances for its use.

a) whether legal remedy in the Applicant's case was prescribed by the applicable law

81. As regards the first principle, the Court recalls that the Applicant is only required to exhaust all internal legal remedies prescribed by law, which are theoretically and practically available to them at the relevant time, which means that these legal remedies are available and capable of providing legal redress in relation to the lawsuit and that they provide reasonable prospects for success (see ECtHR Judgment *Sejdović v. Italy*, Application No. 56581/00, of 1 March 2006, para. 46).

82. The Court notes that in the previous court proceedings the Applicant used the legal remedies available to him in accordance with the applicable law, which enabled him to obtain three decisions in two court instances that were in his favor.

83. Likewise, the Court notes that on 9 December 2018, the Basic Court rendered a new judgment in the repeated proceedings, by which, if the Applicant was not satisfied, he can use again the legal remedy before the Court of Appeals in the form of an appeal.

84. In this regard, the Court recalls Article 195 (Decisions of the second instance court over complaint) of Law No. 03/L-006 on Contested Procedure, which in the relevant part reads:

Article 195

"1. The complaint court in the college session or based on the case evaluation done directly in front of it can:
a) disregard the complaint that arrives after the deadline, it's incomplete or illegal;
b) an disregard the decision and return the case for re-trial in the court of the first instance;;
d) reject the complaint as an un-based one and verify the decision reached;
e) change the decision of the first instance.
The court of the second instance is not linked to the proposal submitted in the complaint."

85. Moreover, the Court notes that Article 211 (Revision) of the same law reads in the relevant part:

"211.1 Against the decision of the court of second instance, sides can present a revision within a period of thirty (30) days from the day the decision was brought.
[...]
211.4 Excluding, when dealt with the charge claim from the paragraph 2 and 3 of this article, the revision is always permitted."

86. Therefore, according to the applicable law, the Court finds that in the case of the Applicant, there are not only one but two legal remedies prescribed by the applicable law, and that both are both theoretically and practically available at the relevant time, by which he can challenge both court decisions and the MPA decisions. The Court also notes that the use of these legal remedies depends exclusively on the Applicant's will.

b) whether the legal remedy was available to the Applicant

87. As regards the principle of availability of a legal remedy, the Court, taking into account the Applicant's action, notes that in the previous part of the proceedings, both before the competent authorities of the MPA and the regular courts, the Applicant used the legal remedies provided by law.

88. In addition, the Court from the actions taken by the Applicant noted that, in fact, and in further proceedings, he used all available legal remedies prescribed by law, which leads to the conclusion that they were at all times available to it.

89. In the same way, the Court does not find that, in the present case, there were, or, in the meantime, arose some specific circumstances which in some way had influence on the further availability of the legal remedies that the Applicant could use in further proceedings.

c) whether the legal remedy was effective in practice

90. The Court recalls that the Applicant specifically cites the fact that the legal remedies prescribed by law are not effective in practice. However, the Court also notes that, in addition to these appealing allegations, he continues to use them, by which he puts into question its allegations of their inefficiency in practice.

91. However, and beside that, the Court analyzing the effectiveness of legal remedies in practice, notes that this issue was an issue with two time intervals, and they are the effectiveness of legal remedies that the Applicant has already used before the MPA and the regular courts, and the effectiveness of legal remedies that the Applicant may use in further court proceedings challenging the decisions of MPA or the regular courts.

92. As regards the effectiveness of legal remedies that the Applicant used in the present part of the proceedings, the Court finds that, by their very essence and results in the present part of the proceedings, they were effective, perhaps not in a way and to the extent the Applicant was expecting, because the effectiveness of legal remedy is not determined on the basis of whether the Applicant succeeded in achieving his goals by his use in the way he wanted, but whether he had the possibility that in the legal remedy he used he could present his arguments to be considered by the competent authorities (see ECtHR judgment *Soering v. the United Kingdom* Series A No. 161, of 7 July 1989, paragraph 120).

93. Furthermore, as regards the question of the effectiveness of legal remedies which the Applicant can use in further proceedings, the Court *can only recall* that from the time when the Applicant used legal remedies for the last time to date, there has been no change in the general legal and social circumstances, which would further influence the effectiveness of legal remedies prescribed by law.

94. The effectiveness of the Applicants' legal remedies so far only justified the "principle of effectiveness in practice", as it can be seen based on the results of the previous court proceedings, thus removing any suspicion that the legal remedies provided by law are ineffective in further judicial proceedings.

95. Moreover, taking into account the legal guidelines of Article 195 of the Law on Contested Procedure, the Court finds that, upon the appeal, the Court of Appeals may also:

> *b) "to annul the challenged judgment and to remand the matter for retrial to the first-instance court;* and it already did this once, and the Court of Appeals can also:
>
> *c) to modify the first instance judgment".*

d) whether there existed some obstacles and special circumstances in the use of legal remedy

96. The Court, making connection between the proceedings and the actions taken by the Applicant in the previous part of the proceedings, with the legal remedies he used, finds that the Applicant took all actions by his will, and not the will of the third party on which proceedings (actions or inactions) it would depend the effectiveness of legal remedy itself, and that such a situation would cause direct obstacles in the procedure of using these legal remedies.

97. Moreover, the Court cannot fail to notice that the law which is applicable and which provides for the legal remedies that the Applicant may use in the further proceedings does not establish or require any special requirements, which it must fulfill as a precondition to use them, except those requirements that determine the time limits for their use.

98. Based on the foregoing, the Court is of the opinion that, in the Applicant's case, there have been no judicial barriers in the present part of the proceedings, and there are no obstacles even in the further court proceedings that would influence or limit the use of the legal remedy prescribed by law to the detriment of the Applicant.

Procedure before a non-judicial institution

99. The Court notes that on 19 September 2018, the Applicant filed an appeal with the Ombudsperson Institution and that the Ombudsperson, acting upon the request, conducted an investigation into the Applicant's allegations, and that on 1 April 2019, it delivered a report with recommendations in which he found *"the right to fair and impartial trial is violated to the entity, which activity has been suspended, due to the delay in the resolution of the case, as established by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights (ECHR), the right to an effective remedy established by Article 54 of the Constitution Republic of Kosovo, as well as Article 13 of the ECHR."*

100. As regards the recommendations, the Ombudsperson recommended in its report to the Government of the Republic of Kosovo *"To amend Administrative Instruction No. 02/2014 on Registration and Functioning of Non-governmental organizations, adopted at the 195th session of the Government of Kosovo, by Decision No. 01/195 of 3.9.2014, or delete Article 18. "*

101. With regard to the Ombudsperson's report with recommendations, the Court emphasizes in particular the fact that the ECtHR in its practice pointed out that the appeal to the Ombudsperson is not in principle a legal remedy to be exhausted under Article 35 of the ECHR (see the ECtHR Judgment *Egmez v. Cyprus*, application para.21 of December 2001, paragraphs 66-73. see, *mutatis mutandis, Montion v. France*, application No. 11192/84, Commission decision of 14 May 1987, Decisions and Reports (DR) 52, para. 227), due to the fact that the Ombudsperson does not have the authority to order any measures or to

impose any sanctions except for a recommendation to the competent institutions.

Findings of the Court

102. The Court noted that, based on the analysis of the factual situation, it follows that the Applicant is leading two proceedings, one of which is an administrative and the other court proceedings.

103. ***The administrative proceedings***, which are pending before the MPA, stem from the first court proceedings initiated by the Applicant regarding the first MPA decision (Pos. No. 06/207/2014) of 17 September 2014. The course of the first court proceedings resulted in 3 court decisions in two court instances, which led to the situation that the case upon the judgment [A. No. 2369/2018], of the Basic Court in the repeated proceedings is currently again before the MPA. The Basic Court in the judgment [A. No. 2369/2018] held *"that the respondent MPA did not consider at all the appealing allegations of the claimant and that all the activities of the claimant were in accordance with the requirements of registration and in accordance with the legal norms of its status. In its decision, the respondent did not specify what activities the claimant performed in contravention of the constitutional and legal order. The Court notes that the respondent's decision contains essential violations of the provisions of Article 84, paragraph 2 of the Law 02/L-028, on the Administrative Procedure, which provide that the administrative act should, inter alia, contain a summary of factual findings based on evidence submitted during administrative proceedings or facts provided by the administration, determining the legal basis on which the act is based".*

104. Moreover, the Basic Court concluded that precisely these flaws in the MPA decisions *"interfere with the assessment of the legality of the challenged decision and, in that direction, the court obliges the responding authority to act in the repeated proceedings in accordance with the remarks given in this judgment and subsequently rectify the abovementioned flaws, to render fair decision based on the law".*

105. ***The court proceedings***, which the Applicant initiated before the Basic Court on 1 November 2018, with a request to stop the execution of the MPA decision of 25 September 2018, is currently in the Court of Appeals upon the appeal filed by the Applicant against the decision of the Basic Court of 4 January 2019.

106. The Court, having regard to its findings, concludes that both proceedings, (administrative and court), initiated by the Applicant, are interconnected and that they are still in the decision-making process. However, the Court also notes that this is about separate proceedings that have their own specificity and complexity.

107. Based on the above, the Court cannot fail to notice that the regular courts in the previous part of the proceedings, have not remained inactive when faced with the allegations in the Applicant's claims. The Court also recalls Article 54 [Judicial Protection of Rights] of the Constitution, which 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".

108. It follows from this that giving priority to judicial protection of rights before the regular courts and other competent authorities, is a very important aspect of the protection of human rights, which the Constitutional Court always takes into consideration. The Court specifically wishes to indicate that all decisions of the state authorities, including the administrative decisions are subject to judicial review.

109. Based on the foregoing, the Court finds that the proceedings initiated by the Applicant are still at the decision-making stage, from which it can be concluded that the Applicant's Referral before the Constitutional Court is premature.

110. In this regard, the Court emphasizes that the principle of subsidiarity requires that the Applicant exhausts all procedural possibilities before the regular proceedings, administrative or judicial proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a right guaranteed by the Constitution (see: ECtHR judgment *Sejdović v. Italy*, application No. 56581/00, of 1 March 2006, paragraph 46, see: case *Demë Kurbogaj and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paragraphs 18-19).

111. Therefore, the Court finds that the Applicant has not yet exhausted all legal remedies foreseen by Article 113, paragraph 7 of the Constitution, Article 47.2 of the Law and Rule 39 (1) (b) of the Rules of Procedure

112. The Court has just concluded that the Applicant has not exhausted all legal remedies, and therefore, it will not deal with the other allegations of the Applicant in connection with alleged violations of other Articles of the Constitution and the ECHR.

Request for interim measure

113. The Court recalls that the Applicant also requests the Court to impose interim measure, stating *"the irreparable damage will be caused if the interim measure is not granted and that the imposition of the interim measure is in the public interest".*

114. The Court has just concluded that the Applicant's Referral is to be declared inadmissible on constitutional basis.

115. Therefore, in accordance with Article 27.1 of the Law and in accordance with Rule 57 (4) (a) of the Rules of Procedure, the Applicant's request for interim measure should be rejected, because it cannot be a subject of review as the Referral was declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 47 of the Law and Rules 39 (1) (b) and 57 (1) of the Rules of Procedure, in its session held on 20 June 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for interim measure;

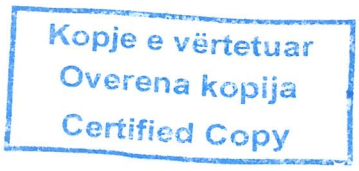
III. TO NOTIFY this Decision to the Parties;

IV. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

V. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi Arta Rama-Hajrizi



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