



REPUBLIKA E KOSOVËS – РЕПУБЛИКА КОСОВО – REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

Prishtina, 2 May 2017  
Ref. No.:RK 1057/17

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI44/16**

Applicant

**Biljana Topko**

**Constitutional review of Judgment GSK-KPA-A-225/13 of the Supreme  
Court of Kosovo – Appeals Panel of the Kosovo Property Agency  
of 4 September 2015**

**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 Biljana Topko from Belgrade, Republic of Serbia (hereinafter: the Applicant).

## **Challenged decision**

2. The Applicant requests the constitutional review of Judgment GSK-KPA-A-225/13 of the Supreme Court of Kosovo – of the Appeals Panel of the Kosovo Property Agency (hereinafter: the Appeals Panel) of 4 September 2015.
3. The challenged decision was served on the Applicant on 6 November 2015.

## **Subject matter**

4. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant's right guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 [Right to a fair trial], Article 13 [Right to an effective remedy] and Article 1 of Protocol 1 of the European Convention on Human Rights (hereinafter: ECHR).

## **Legal basis**

5. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 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 2 March 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 14 April 2016, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Robert Carolan (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
8. On 26 April 2016, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Appeals Panel.
9. On 13 January 2017, the President of the Court appointed Judge Almiro Rodrigues as Presiding of the Review Panel replacing Judge Robert Carolan, who resigned, on 9 September 2016, from the position of a Judge of the Constitutional Court.
10. On 31 March 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court on the inadmissibility of the Referral.

## Summary of facts

11. On 23 January 1997, the Applicant by Decision (Oz. No. 351-106) was allocated by the Municipality of Suhareka the parcel for temporary use, and the permit to construct the temporary mounting construction (garage) on the same parcel.
12. After this, the Applicant built the mounting construction (garage) on the abovementioned parcel and used it in an unimpeded way until 1999.
13. On 5 December 2006, the Applicant submitted a request to the Property Claims Commission of the Kosovo Property Agency (hereinafter: KPCC) requesting to protect her property right over the property in question, which was temporarily allocated to her by the above-mentioned decision.
14. On 14 December 2012, the KPCC (Decision KPCC/D/C184/2012) rejected the Applicant's request due to lack of jurisdiction, considering that the disputed property does not fall into the category of the immovable property. The KPCC in the reasoning of its judgment *inter alia* states that:

*"[...] In accordance with decision of the Municipality of Suhareka, the Applicant was entitled only to a temporary use of the subject property and she was given permit only to build a mounting construction (garage) on the property. Therefore the request relates to movable property and not to private immovable property for which the KPCC has no jurisdiction [...] The claims were rejected because they were not under the jurisdiction of the commission or for procedural reasons and not because they are without any ground, they can be resolved in the local courts in accordance with the applicable laws [...]."*

15. On 25 July 2013, the Applicant filed an appeal with the Appeals Panel against the decision of the KPCC.
16. On 4 September 2015, the Appeals Panel (by Judgment GSK-KPA-A-225/13) rejected the Applicant's appeal as ungrounded and upheld the decision of the KPCC. The Appeals Panel in the reasoning of its judgment *inter alia* states that:

*"[...] the decision on the allocation and the construction permit contains only the permit to construct a mounting construction type of building. Therefore, this type of building cannot be considered as an immovable property, because, when someone obtains the construction permit to construct a mounting construction of temporary nature, the same cannot construct a permanent building with solid material [...]."*

## Applicant's allegations

17. The Applicant alleges that the proceedings before the regular courts violated her rights to effective legal remedy, to fair and impartial trial, to protection of property and to judicial protection of rights, which are guaranteed by the Constitution, the ECHR and by the international agreements.



18. The Applicant further alleges that there has been a violation because the competent authorities failed to act properly and in the manner provided by law regarding her request.
19. The Applicant requests the Court “to annul Judgment GSK-KPA-A225/13 of 04.09.2015 of the Appeals Panel of the Supreme Court on KPA related matters in the case KPA 14816 (KPCC/D/C/184/2012) of 14.12.2012, and order the KPA and the court to take during the repeated procedure all necessary legal and factual actions in accordance with the law, namely to approve the Applicant’s claim and enable the restitution of the property.”

### **Assessment of the admissibility of the Referral**

20. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and in 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 further refers to Article 48 [Accuracy of the Referral] of the Law, which provides:

*“In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.”*

23. In addition, the Court takes into account Rule 36 [Admissibility Criteria] (2) (b) and (d) of the Rules of Procedure, which stipulates that:

*„(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.”*

24. The Court notes that the Applicant’s allegations may be summarized as it follows:

- (i) violation of Article 31 of the Constitution and Article 6 of ECHR in conjunction with Article 13 of ECHR and other Articles of the Constitution.
- (ii) violation of Article 46 of the Constitution and Article 1 of Protocol 1 of ECHR in conjunction with other Articles.

**(i) Alleged violations of Article 31 of the Constitution and Article 6 of the ECHR in conjunction with Article 13 of ECHR and in conjunction with other Articles**

25. The Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

*“1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*

*2. Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations [...] within a reasonable time by an independent and impartial tribunal established by law.”*

26. The Court refers to Article 6.1 of the ECHR, which establishes:

*„In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing [...] by a tribunal.”*

27. In addition, the Court takes into account Article 13 of the ECHR:

*“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.”*

28. The Applicant alleges that *“there has been a violation because the competent authorities failed to act properly and in the manner provided by the law regarding her request”* contrary to Article 31 [Right to Fair and Impartial Trial] and Article 6 of the ECHR.

29. The Court notes that the main question that was raised before the regular courts was an issue of *“confirming the right to property.”* The KPCC (by Decision KPCC/D/C184/2012) reasoned that in the present case, the request was rejected because the property in question does not fall into the category of immovable property, and that the resolution of such disputes are under the jurisdiction of the local courts.

30. This conclusion of KPCC was supported also by the Appeals Panel (by Judgment GSK-KPA-A 225/13). The Appeals Panel in the reasoning of its Judgment, *inter alia*, states that: *“the decision on the allocation and the construction permit contain only the permit to construct a mounting construction type of building. Therefore, the garage cannot be considered as an immovable property, because, when someone acquires the construction*



*permit to construct a mounting construction of temporary nature, the same cannot construct a permanent building with solid material.”*

31. The Court considers that the Applicant tried to build her case on legal basis, namely on an incorrect interpretation of the relevant laws by the regular courts, as well as on the erroneous assessment of evidence.
32. The Court reiterates that it is not its task to deal with errors of facts or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). When alleging violation of her constitutional rights and freedoms protected by the Constitution, by the public authority, the Applicant must present a reasoned allegation and a convincing argument.
33. In addition, the Court also reiterates that the role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments, and, therefore, cannot act as a “fourth instance court” (See, case *Garcia Ruiz vs. Spain*, No. 30544/96, ECHR, Judgment of 21 January 1999; see also case KI70/11 of the Applicants: *Faik Hima, Magbule Hima and Bestar Hima*, Constitutional Court, Resolution on Inadmissibility of 16 December 2011).
34. The Court considers that all the arguments of the Applicant that were relevant to the resolution of the dispute, were duly heard and duly examined by the regular courts, that the material and legal reasons for the decision the Applicant challenges were presented in detail and that the proceedings before the regular courts, viewed in their entirety, were fair.
35. Therefore, the Court finds that there has been no violation of Article 31 of the Constitution and of Article 6 in conjunction with Article 13 of ECHR.
36. In addition, the Applicant further refers to violations of Articles 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution.
37. The Court considers that it is not necessary to review these allegations, because the Applicant did not prove how these Articles relate to her fundamental rights.

**(ii) Alleged violations of Article 46 of the Constitution, and Article 1 of Protocol 1 of ECHR in conjunction with other Articles**

38. The Court refers to Article 46 [Protection of Property] of the Constitution, which establishes:
  1. *The right to own property is guaranteed.*

[...]
39. In addition, the Court takes into account Article 1 of Protocol 1 of ECHR:

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

#### **A. General principles regarding the right to protection of property**

40. 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 to Article 46 of the Constitution and explain the scope of protection of the right to property (see *Kopecký v. Slovakia*, paragraph 35, ECHR Judgment of 28 September 2004, *MALTZAN (FREIHERR VON) and others v. Germany*, paragraph 74 ECHR decision on admissibility of 2 March 2005).
41. 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 related 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 they will be realised. 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**

42. In the present case, the Court notes that the Applicant is not the property right holder; on the contrary she tried to acquire a property, 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.”

43. All her “legitimate expectation” that she will acquire the effective enjoyment of a property right were based on Decision Oz. No. 351-106 of the Municipality of Suhareka, by which she obtained the parcel on temporary use and permit to construct the temporary mounting construction (garage).
44. The Court notes that the KPCC (by Decision KPCC/D/C184/2012) rejected the Applicant's request for lack of jurisdiction.
45. The Court further notes that the Appeals Panel by Judgment (GSK-KPA-A-225/13) found that “the disputed property is the socially owned property registered in the cadastral operate of the Municipality of Suhareka.”
46. The Court further recalls that Article 1 of Protocol No. 1 „does not guarantee the right to acquire the property.” Decision Oz. No. 351-106 of the Municipality of Suhareka clearly states that the Applicant was given the temporary permit for the construction of the mounting construction building of provisional nature. In view of the foregoing, it is clear that the disputed immovable property was never in the ownership of the Applicant. The Applicant's allegations that there has been a violation of her “right to peaceful enjoyment of possessions” were ungrounded.
47. The Court reiterates that the “legitimate expectation” 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.
48. Accordingly, the Court finds that the decisions of the KCPP and of the Appeals Panel did not violate Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR.

## Conclusion

49. In sum, the Applicant has not substantiated that the relevant proceedings have been in any way unfair or arbitrary (see: *mutatis mutandis: Shub vs. Lithuania*, no. 17064/06, ECHR, Decision of 30 June 2009). In fact, the Applicant has not substantiated and proved that the challenged decisions violated her constitutional rights and freedoms guaranteed by the Constitution and the ECHR.
50. Therefore, the Court considers that the admissibility requirements, as established in the Constitution, foreseen by the Law and as further specified in the Rule of Procedure, have not been meet.
51. Accordingly, the Applicant's Referral is manifestly ill-founded on constitutional basis, and as such, inadmissible.



## FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 48 of the Law, and Rule 36 (2) (b) and (d) of the Rules of Procedure, on its session held on 31 March 2017, 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;

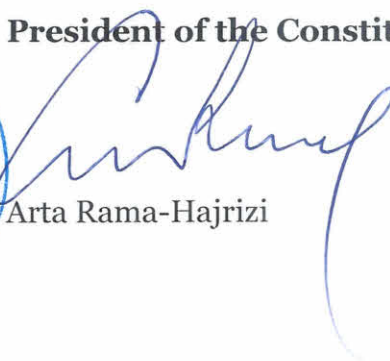
**Judge Rapporteur**



Snezhana Botusharova



**President of the Constitutional Court**



Arta Rama-Hajrizi