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

Prishtina, on 22 February 2016
Ref. No.:RK895/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI125/15

Applicants

Safet Elshani and others

Constitutional Review of the Judgment, ARJ-UZVP no.19/2015 of the Supreme Court of the Republic of Kosovo, of 28 May 2015

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicants

1. The Referral was submitted by six applicants, namely Mr. Safet Elshani, Mr. Ismet Elshani, Mr. Bektash Elshani, Mr. Zymer Elshani, Mr. Mehmet Elshani and Mr. Imer Elshani, residing in Suhareka (hereinafter, the Applicants). They are represented by Mr. Zef Delhysa, lawyer practicing in Prizren.

Challenged Decision

2. The Applicants challenge the Judgment, ARJ-UZVP no.19/2015 of the Supreme Court of the Republic of Kosovo (hereinafter, the Supreme Court) dated 28 May 2015, which was served on the Applicants on 16 June 2015.

Subject Matter

3. The subject matter is the constitutional review of the challenged decision which rejected the Applicants' appeal filed against the Judgment (AA. No. 111/2014, of 24 February 2015) of the Court of Appeal of the Republic of Kosovo (hereinafter, the Court of Appeal) concerning the annulment of a decision on expropriation.

4. The Applicants allege that the regular courts have violated their rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter, the Constitution), namely Article 21 [General Principles]; Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property]. The Applicants also allege a violation of Article 6 [Right to a Fair Trial] and Article 1 [Protection of Property] of Protocol No.1 to the ECHR; and a violation of Article 17 of the Universal Declaration on Human Rights (hereinafter, UDHR).

5. The Applicants also request from the Constitutional Court of the Republic of Kosovo (hereinafter, the Court) to impose an interim measure, namely to order the Municipality of Suhareka to prohibit the access, use or any other construction activity on the immovable property which is the subject of the dispute.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 54, 55 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 15 October 2015 the Applicants submitted the Referral to the Court by postal services.

8. On 5 November 2015 the President by Decision, GJR. KI125/15 appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date the President by Decision, KSH. KI125/15 appointed the Review Panel composed of Judges Altay Suroy (presiding), Arta Rama-Hajrizi and Bekim Sejdiu.

9. On 4 December 2015 the Court informed the Applicants of the registration of the Referral and requested that they file a power of attorney for Mr. Zef Delhysa, in case they choose to be represented by him. On the same date the Court sent a copy of the Referral to the Supreme Court.

10. On 14 December 2015 the Applicants submitted the power of attorney with the Court.

11. On 18 December 2015 the Applicants submitted an additional letter where they requested from the Court to impose an interim measure.

12. On 25 January 2016 the Court sent a letter to the Basic Court in Prishtina requesting a copy of the letter of receipt confirming the date when the Applicants received the challenged decision.

13. On 26 January 2016 the Basic Court in Prishtina submitted the requested document with the Court.

14. On 8 February 2016 the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court to declare the Referral as inadmissible and to reject the request for interim measures.

Summary of facts

15. The deceased father of the Applicants had property rights over a land which is located in today's Municipality of Suhareka.

16. On 17 December 1962 the Provincial Secretariat for Financial Matters (Decision No. 03-6091/62) expropriated the land of the deceased father of the Applicants for the purpose of establishing a market for vegetables in Suhareka.

17. On 9 February 2010 the Applicants, as heirs of the land of their deceased father, submitted a request with the Municipality of Suhareka whereby they requested the annulment of the abovementioned decision on expropriation.

18. On 2 March 2010 the Directorate for Urban, Cadastral, Property and Protection of Environment of the Municipality of Suhareka (hereinafter, the Directorate of UCPP), by Decision No. 07-465-71, rejected the Applicants' request as ungrounded. It based its decision on the fact the Applicants have missed the deadline provided by the law to request such annulment.

19. The Applicants appealed the abovementioned decision before the Cadastral Agency of Kosovo (hereinafter, CAK).

20. On 20 May 2010 CAK (Decision No. 03/432/10) rejected the Applicants' appeal as ungrounded. CAK confirmed the Decision of the Directorate of UCPP by stating that the latter had respected the applicable law, according to which the interested party could not request the annulment of a decision on expropriation after 10 (ten) years have passed following the day it became enforceable.

21. Unsatisfied with the conclusion of the proceedings before the Directorate of UCPP and CAK, the Applicants initiated an administrative conflict challenging the Decision (No. 03/432/10, of 20 May 2010) of CAK.

22. On 16 January 2014, the Basic Court in Prishtina (Judgment, A. No. 569/10) rejected the claim of the Applicants as ungrounded. It reasoned that the request

of the Applicants for annulment of the decision on expropriation has been submitted *"beyond any possible legal deadline"*.

23. The Applicants filed an appeal with the Court of Appeal claiming that the Judgment of the Basic Court in Prishtina had wrongly applied the material law. According to the Applicants the applicable law provided no time limit to submit a request for annulment of a decision on expropriation.

24. On 24 February 2015 the Court of Appeal (AA. no. 111/2014, of 24 February 2015) rejected the Applicants' appeal as ungrounded. It reasoned that the Basic Court of Prishtina had rightly applied the material law by applying Article 21.5 of the Law on Expropriations (Official Gazette No. 21/78). According to this legal provision, the Court of Appeal further reasoned that all interested parties could challenge a decision on expropriation within a deadline of 10 (ten) years from the moment when such decision became enforceable. It further continued that an amendment to this law provided that the deadline to submit such request was reduced to 5 (five) years.

25. Against the abovementioned Judgment of the Court of Appeal the Applicants filed a request for an extraordinary review with the Supreme Court alleging that the decision of the second instance court was taken with wrong application of the material law and contained procedural violations. They requested from the Supreme Court to annul the Judgment of the Court of Appeal and remand the case for retrial.

26. On 28 May 2015, the Supreme Court (Judgment, ARJ-UZVP. No. 19/2015) rejected the request of the Applicants for extraordinary review as ungrounded and held that:

    "The Supreme Court of Kosovo [...] entirely admits the legal stance of the second instance court as correct and fair. [...] Pursuant to Article 21.4 of Law no. 21/78 on Expropriation [...] after the lapse of 10 years, starting from the date when the decision on expropriation became final, no request for annulling such decision can be filed. [...] Considering such situation of the case, the Supreme Court did not find any reason to render a decision different from the one rendered by the second instance court, which rejected the Claimants' [Applicants'] *appeal as ungrounded. [...]"*

Applicant's allegations

27. The Applicants allege that the regular courts have violated their rights guaranteed by the Constitution, namely Article 21 [General Principles], Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property]; their rights guaranteed by Article 6 [Right to a Fair Trial] of the ECHR and Article 1 [Protection of Property] of Protocol No.1 to the ECHR; and their right under Article 17 of the UDHR.

28. In supporting the alleged violations in respect of the right to property as guaranteed by Article 46 of the Constitution, Article 1 of Protocol No. 1 to the ECHR and Article 17 of the UDHR, the Applicants stated that: *"[...] the request*

of the Applicants is based on law, provisions of which have been violated by all competent organs in the concrete case [...]."

29. In this respect they further allege that according to Article 34 of the Law No. 12/57 on Expropriations of the Federal Republic of Yugoslavia "*no time-limit was sanctioned in respect of submitting a request for annulment of a decision on expropriation.*" Therefore, considering that there was no time limit, the Applicants argue that they have submitted their request in compliance with the provision of the abovementioned law.

30. Finally, the Applicants conclude by requesting the following from the Court:

    "*By this Referral, we appeal to the Constitutional Court to render a DECISION, declaring Judgment ARJ-UZVP no. 19/2015 of the Supreme Court of Kosovo, of 28 May 2015; Judgment AA. No. 111/2014 of the Court of Appeal of Kosovo, of 24 February 2015; Judgment A. no. 569/10 of the Basic Court in Prishtina – Department for Administrative Matters, of 16 January 2014; Decision No. 03/432/10 of the Kosovo Cadastral Agency, of 20 May 2010; and Decision 07 No. 465-71 of the Directorate for Urban, Cadastral, Property, and Environment Protection, of 02 March 2010, as unconstitutional, with the proposal that the violations mentioned and confirmed by the Constitutional Court, be eliminated in the retrial or reconsideration procedure.*"

Admissibility of the Referral

31. The Court first examines whether the Applicants have met the requirements of admissibility as foreseen by the Constitution and further specified by the Law and Rules of Procedure.

32. In this respect, the Court refers to Rules 36 (2) (b) and (d) of the Rules of Procedure which provide that:

    "*(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
    [...], or
    (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."

33. As mentioned above the Applicants' allege that the Judgment (ARJ-UZVP no.19/215, of 28 May 2015) of the Supreme Court was rendered in violation of their "*right to fair and impartial trial; general principles and protection of property*" as respectively guaranteed by the Constitution, ECHR and its Protocol No. 1, and UDHR. Furthermore, the Applicants also allege that the Judgment (AA. no. 111/2014, of 24 February 2015) of the Court of Appeal and the Judgment (A. no. 569/10, of 16 January 2014) of the Basic Court in Prishtina were also rendered in violation of such rights.

34. With regards to the *"right to a fair and impartial trial"* and *"general principles"*, the Applicants merely referred to the respective articles of the Constitution and the ECHR. They did not provide any further reasoning as to how and why such rights have been violated by the regular courts.

35. With regards to the right to *"protection of property"*, the Applicants claimed that the regular courts have wrongly applied the material law since *"the applicable law did not foresee a legal deadline for submission of a request for annulment of a decision on expropriation"*.

36. In this respect, the Court notes that the Basic Court in Prishtina, the Court of Appeal and the Supreme Court have reasoned their decisions referring to the provisions of the law in force when rejecting the Applicants' request for annulment of the decision on expropriation. In this regard, the Court finds that what the Applicant raises is a question of legality and not of constitutionality.

37. In relation to this, the Court recalls the reasoning of the Supreme Court in answering the Applicants' allegation of violations of the law allegedly committed by the Court of Appeal when it rejected his appeal filed against the Judgment of the Basic Court in Prishtina. The Supreme Court stated that: *"the second instance court has correctly applied the administrative procedure provisions, those of the Law on Administrative Conflict, and Law amending and supplementing the Law on Expropriation, since the immovable property of the Claimants* [Applicants'] *was expropriated in 1959* **[1962]**, *while the Claimants requested the annulment of the decision on expropriation after the expiry of the time limit [...]."*

38. In this regard, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the Supreme Court, unless and in so far as it may have infringed rights and freedoms protected by the Constitution (constitutionality).

39. The Constitutional Court further reiterates that it is not its task under the Constitution to act as a court of fourth instance, in respect of the decisions taken by the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. (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). The mere fact that the Applicants are not satisfied with the outcome of the proceedings in their case do not give rise to an arguable claim of a violation of their rights as protected by the Constitution, ECHR and UDHR.

40. The Court notes that the Applicants had ample opportunities to present their case before the regular courts. The issue of the applicable law has been extensively addressed by all regular courts. The Court of Appeal and the Supreme Court have responded to all claims of the Applicants as to whether the applicable law had foreseen a deadline to submit a request for annulment of a decision on expropriation or not.

41. In this respect, it is important to note that the Constitutional Court can only consider whether the evidence has been presented in a correct manner and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicants had a fair trial (see *inter alia* case *Edwards v. United Kingdom*, Application No 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991).

42. The Court notes that the reasoning referring to the request for annulment of the decision on expropriation in the Judgment of the Supreme Court is clear and, after having reviewed all the proceedings, the Court has also found that the proceedings before the Court of Appeal and the Basic Court in Prishtina have not been unfair or arbitrary (See case *Shub vs. Lithuania*, no. 17064/06, ECHR, Decision of 30 June 2009).

43. For the foregoing reasons, the Court considers that the facts presented by the Applicants do not in any way justify the alleged violations of the constitutional rights invoked by the Applicants and that they have failed to substantiate their claims as to how and why their rights have been violated.

44. Consequently, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and should be declared inadmissible pursuant to Rules 36 (2) (b) and (d) of the Rules of Procedure.

Assessment of the Request for Interim Measure

45. The Applicants also requested from the Court to impose an interim measure, namely to order the Municipality of Suhareka to prohibit the access, use or any other construction activity on the immovable property which was expropriated in 1962.

46. In this regard, the Applicants state that:

"The Municipality of Suhareka as a constitutional institution of local governance was informed from the applicants that the latter have submitted a request with the Constitutional Court [...].

The Municipality of Suhareka [...] has not invested not even a cent [EURO cent] in the land subject of the dispute, whereas 3-4 days before, [...] it has undertaken specific construction acts by leveling up the immovable property with sand so that the same is used as auto-parking. [...] the Municipality of Suhareka not only it does not wait for a decision of the Constitutional Court in the concrete case, but it has also changed the destination of the immovable property [...]."

47. Furthermore, the Applicants claim that the Municipality of Suhareka is undertaking *"illegal decisions"* which may create further *"legal complications"* with respect to this case. In the view of evading such complications that may bring to irreparable damage and in order not to generate more tension in respect of the current situation, the Applicants argue that the interim measure should be granted by the Court.

48. In order for the Court to decide on an interim measure, pursuant to Rule 55 (4) and (5) of the Rules of Procedure, it is necessary that:

> *"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
>
> *(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and*
>
> *(...) If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application."*

49. As emphasized above, the Applicant has not shown a *prima facie* case on the admissibility of the referral. Therefore, the request for interim measure should be rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Articles 27 and 47 (2) of the Law and Rules 36 (2) (b) and (d), 55 (4) and 56 (2) of the Rules of Procedure, on 8 February 2016, unanimously:

DECIDES

I. TO DECLARE the Referral as Inadmissible;

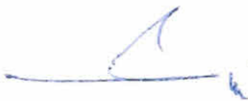
II. TO REJECT the Request for Interim Measures;

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. TO DECLARE this Decision effective immediately.

Judge Rapporteur **President of the Constitutional Court**



Snezhana Botusharova Arta Rama-Hajrizi