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

Pristina, 22 December 2010
Ref. No.: RK 77/10

JUDGMENT

in

Case No. KI. 56/09

Applicants

Fadil Hoxha and 59 Others

vs.

Municipal Assembly of Prizren

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicants

1. The Applicants are Mr. Fadil Hoxha and 59 other residents from the Municipality of Prizren.

The Opposing Party

2. The Opposing Party is the Municipal Assembly of Prizren.

Subject Matter

3. The subject matter of the case is the Applicants' request of 11 September 2009 to assess the constitutionality of Decision No 01/011-3257 of 30 April 2009 (hereinafter referred to as: Decision of 30 April 2009) issued by the Municipal Assembly of Prizren.

4. In addition, the Applicants requested imposition of interim measures ordering the immediate suspension of the execution of the Decision of 30 April 2009 as well as the suspension of any construction at the Jaglenica Area in Prizren until the Constitutional Court decides on this matter.

Legal Basis

5. The Referral is based on Article 113.7 of the Constitution, Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the "Law") and Sections 54 and 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

The facts as alleged by the parties

6. By Decision of 30 April 2009, an earlier Decision of the Municipal Assembly of Prizren for a Detailed Urban Plan (DUP) for the neighbourhood of Jaglenica (now Dardania) from 1983 was amended. These amendments, in their relevant part, are specified in paragraphs 1 and 2 of the Decision of 30 April 2009, and read as follows:

> *"By this decision an earlier Decision for Detailed Urban Plan of the former neighbourhood Jaglenica now "Dardania" in Prizren issued under No 01/011-72 on 1 June 1983 and published in the Official Gazette No. 27/83 has been amended."*
>
> *"Amendments ... of DUP are as follows: "In the graphical part of the technical plan in the cadastral plots no 1958,1960,1953,1954 and 1960 instead of an existing green environment foreseen in the Detailed Urban Planning, it has now been planned to construct high tower blocks, planned for families of martyrs and social cases..."*

7. According to the Applicants, no public review and/or participation preceded the adoption of Decision of 30 April 2009. The Opposing party confirmed this allegation in their written submission of 11 November 2010 and during the public hearing held on 15 July 2010.

8. Pursuant to its Article 5, Decision of 30 April 2009 entered into force on the same date of its adoption. It did not contain any indication of any possible legal remedy.

9. It is undisputed by the Parties that the Detailed Urban Plan of 1983 envisaged a green area in the cadastral plots no 1958,1960,1953,1954 and 1960. It is also undisputed that according to Decision of 30 April 2009 it has been planned to construct high tower blocks, planned for families of martyrs and social cases on that area.

10. According to the written allegations of the Opposing Party of 11 November 2009 "the intervention in this area will facilitate the proper management of this location,..., it is fair to state that this area has become nothing more of a wasteland of garbage, by throwing different waste and building materials, causing pollution of the environment."

11. On 13 July 2009, the Applicants, as members of an "ad hoc Initiative of Dardania Municipality", submitted a request to the Municipal Assembly to quash the Decision of 30 April 2009. To this request the Applicants attached a Petition signed by 393 residents of Jaglenica neighbourhood.

12. They requested the annulment of the Decision of 30 April 2009. In particular the Applicants recalled Article 69 of the Law on Local Self-Government (No.03/L-40) and Article 95 of the Statute of the Municipality Prizren as the legal basis for submitting the Petition. The Applicants underlined that the contested Decision had been adopted contrary to the relevant Articles of the Law on Spatial Planning (No 2003/14) and the Law on Local Self-Government (No.03/L-040).

13. On 11 September 2009, the Applicants filed a complaint with the Ombudsperson. On 30 October 2009, the Ombudsperson submitted an Urgent Request for Imposition of Interim Measure to the President of Prizren Municipality requesting an immediate suspension of any construction at the site until the Ombudsperson considered the case more thoroughly as well as until the Constitutional Court decides on the merits of the case.

14. On 19 April 2010, the first Applicant, Mr. Fadil Hoxha complained to the Ministry of Environment and Spatial Planning and informed them about all the irregularities and shortcomings that preceded the adoption of the Decision of 30 April 2009. The Applicants received no written reply to that request.

15. On 14 May 2010, the Directorate for Urban and Spatial Planning issued the Invitation for Public Discussion on the Amendment and Supplementation of the DUP Jaglenica for 24 May 2010.

16. According to the Opposing Party's allegation, a public discussion on the amendment and supplementation of the DUP for Jaglenica was held on 24 May 2010.

17. Meanwhile, the Decision of 30 April 2009 was not amended in any way.

Procedure before the Court

18. On 11 September 2009, the Applicants submitted the Referral to the Constitutional Court requesting the Court to evaluate the constitutionality of the Decision of 30 April 2009.

19. On 17 October 2009, the Applicants supplemented the Referral with further arguments requesting the Court to grant Interim Measures ordering the Opposing Party to suspend immediately any action or work in the plot of land concerned in order to avoid any irreparable damages.

20. On 25 November 2009, the Constitutional Court deliberated and concluded , without prejudging the final outcome of the Referral, that the Applicants had put forward enough convincing arguments justifying the granting of the request for interim measures, because the implementation Decision of 30 April 2009 issued by the Municipal Assembly of Prizren may result in unrecoverable damages for the Applicants.

21. On 15 December 2009, the Constitutional Court issued a Decision to grant the request for interim measures for a duration of no longer than 3 months, ordering immediate suspension of the execution of Decision of 30 April 2009 as well as suspension of any construction at the Jaglenica Area in Prizren for the same duration. On 15 March 2010, the Constitutional Court decided to grant the extension of the interim measures for 45 days. On 30 April 2010, the Court decided to extend the duration of the interim measures for an additional period of two months.

22. On 27 May 2010, the Applicants informed the Constitutional Court that the Opposing Party issued an invitation to the residents of the neighbourhood for a public discussion on the supplementation and amendments of the DUP Jaglenica. The invitation, issued on 14 May 2010 by the Directorate for Urban and Spatial Planning of Municipality of Prizren, reads, in its pertinent part, as follows: "Citizens are invited to take part in the Public Discussion on the amendment and supplementation of the Detailed Urban Plan of "Jaglenica" neighbourhood –now "Dardania" that will be held on 24 May 2010.... For the construction of buildings dedicated to families of martyrs and social cases."

23. On 28 May 2010, the Secretariat of the Constitutional Court requested the President of Prizren Municipality to provide information on the full details on the procedure leading to the calling of that Public Hearing on 24 May 2010. The Court received a reply on 4 June 2010.

24. On 16 June 2010, the Judge Rapporteur presented an additional Report to the Court. The Court deliberated on the same date and decided by majority vote that the Referral was admissible. Due to the complexity of the case, the Court also decided to hold a public hearing. On the same date, the Court decided, without prejudging the final outcome of the Referral, to extend the interim measures for a further period of 90 days from 30 June 2010.

25. On 15 July 2010, the public hearing was held at which the Applicants' representative was present as well as representatives of the Municipal Assembly. A representative of the Ministry of Environment and Spatial Planning was also present at the hearing.

26. On 22 September 2010, the Court met in private session to deliberate and it adopted this judgement.

The Applicants' complaints

27. The Applicants initially complained that their rights guaranteed by Art. 52(2) of the Constitution had been violated. That Article provides: *"Everyone should be provided an opportunity to be heard by public institutions and have their opinions considered on issues that impact the environment in which they live."*

28. The Applicants further complained that there was an immediate risk that the work on the plot of land concerned would cause irreparable damage to them and therefore requested the Court to issue the interim measures with immediate effect.

29. At the public hearing, the Applicants' representative also alleged that Article 45 of the Constitution (freedom of election and participation), Article 123(3) (General Principles on Local Self Government), and Article 124 (Local Self Government Organization and Operation) had been violated.

30. Throughout the entire procedure before the Constitutional Court the Applicants complained that the challenged decision of 30 April 2009 had been adopted in violation of several laws, most notably the Law on Spatial Planning and Law on Local Self Government. As such the Applicants argued that Decision of 30 April was not taken in conformity with the Constitution and therefore should be annulled.

The Opposing Party's comments

31. The Municipal Assembly of Prizren, in its written submissions of 11 November 2009, contested the Applicants' claims as submitted in the Referral. In particular, the Opposing party argued that the Decision of 30 April 2009 was adopted in accordance with the Law on Spatial Planning and that the plot of land at issue was classified as public property, which entitled the Municipality Assembly Prizren to pursue a well balanced and gradual development of the spatial planning of that plot.

32. The Opposing Party was explicit, both in their written submission on 11 November 2009 and during the public hearing held on 15 July 2010, that the Law on Spatial Planning did not require any public participation before the Decision of 30 April 2009 was adopted.

33. On 16 April 2010, the Directorate of Urbanism and Spatial Planning of the Municipality of Prizren, objected to the decision of the Constitutional Court to continue the temporary measure for an additional 45 days. The Opposing party argued in particular that Regulatory Urban Plan "Dardania 2" adopted by decision 01/011-3756 of 17 July 2009 was drafted in accordance with the urban norms and standards.

34. On 4 June 2010, the Opposing Party's Directorate for Urbanism replied to the Court's letter of 28 May 2010 informing the Court that a public discution was held on 24 May 2010. It seems that at that occasion an Urban Plan has been presented to the residents of the neighbourhood Dardania 2 (formerly Jaglenica).

35. From the written submission of the Opposing Party of 4 June 2010 it appears that the they were in favour of finding a compromise solution between the Applicants' demand for environmental protection and the Municipality's interests in constructing the new buildings. At the public hearing, the representative of the Opposing Party clarified that a compromise solution would be to revise the project in order to adjust it with the other buildings in that area and to lower the buildings from the P+4 into the P+3 *etage*.

The Ministry of Environment Municipal and Spatial Planning comments

36. The Ministry of Environment and Spatial Planning, as an interested party before the Constitutional Court, emphasized, at the public hearing held on 15 July 2010, that following receipt of the request on the Applicant's representative on 16 February 2010, the matter was addressed within the Ministry by the Spatial Planning Department and the Spatial Planning Institute.

37. On 2 July 2010, the representative of the Ministry' inspectorate made a site inspection and requested supplementary documentation from the officials of the Prizren Municipality Directorate for Urbanism and Spatial Planning. This supplementary documentation was not provided. On 5 July 2010, the Ministry reiterated the aforementioned request for the supplementary documentation. However, the Ministry had not received the requested documentation by the date of the public hearing.

Admissibility

38. It should be recalled at the outset that in accordance with Article 113 (7) of the Constitution the subject matter of the review before the Constitutional Court is alleged violation by public authorities of the rights and freedoms guaranteed by the Constitution.

39. Consequently, in the present case the Constitutional Court considered the alleged violation by the Opposing Party of the rights and freedoms guaranteed to the Applicants by the Constitution, most notably Article 52 (2) of the Constitution.

40. With regard to the remaining complaints, in particular those that relate to the alleged violation of the laws in particular the Law on Spatial Planning it should be reiterated that it is not the task of the Constitutional Court to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by public authorities including the regular courts. Neither is it the task of the Constitutional Court to consider the legality of the challenged act, in the present case the Decision of 30 April 2009.

41. In order to be able to adjudicate the Applicants' Referral, the Constitutional Court needs first to examine, whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution.

42. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

> *"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";*

and to Article 47.2 of the Law, which stipulates that:

> *"The individual may submit the referral in question only after he/she has exhausted all legal remedies provided by the law."*

43. The Constitutional Court recalls that the similar admissibility criterion is prescribed by Article 35 of the European Convention on Human Rights.

44. According to the well established jurisprudence of the European Court on Human Rights, the Applicants are only required to exhaust domestic remedies that are available and effective. Furthermore, this rule must be applied with some degree of flexibility and without excessive formalism. The European Court on Human Rights further recognized that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see European Court on Human Rights judgment in the case *Akdivar v. Turkey* judgment of 16 September 1996).

45. Moreover, where a suggested remedy did not in fact offer reasonable prospects of success, for example in light of settled domestic case law, the fact that the applicant did not use it is no bar to admissibility (see European Court on Human Rights judgment in the case of *Pressos Compania Naviera S.A. v. Belgium* of 20 November 1995, para. 27; Radio France c. France, no. 53984/00, decision of 23 September 2003, para. 33). According the case-law of the European Court of Human Rights the administrative authorities form one element of a State subject to the rule of law, and that their interests coincide with the need

for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose (see, *mutatis mutandis*, *Hornsby v. Greece*, judgment of 19 March 1997, *Reports* 1997-II, p.511, para. 41).

46. The Constitutional Court has therefore to consider which domestic remedies with regard to the Applicants right guaranteed by Article 52(2) of the Constitution were available and effective to the Applicants and whether they had exhausted them.

47. In fact, the Constitutional Court notes that the Decision of 30 April 2009 was adopted pursuant to Article 15 of the Law on Spatial Planning (Law No 2003/14 as amended by Law 2008/03-L-106) which prescribes that the urban regulatory plans shall determine the conditions for regulations of space as well as the rules of building on urban land plots. These plans shall be reviewed and if necessary revised every five years.

48. The Court also notes that basic principles of the spatial planning and regulation in the Law on Spatial Planning are based on the internationally acceptable principles that are explicitly referred in it. As such, Article 3 (b) of the Law on Spatial Planning guarantees promotion of an inclusive and participatory process of formulating development strategies and physical plans, which includes all stakeholders and communities without discrimination. Article 3 (c) further guarantees the principle of promotion of full transparency in the planning and decision making process allowing stakeholders access to planning data and maps necessary for their full participation as a citizen's right and duty. These principles are further elaborated in Article 19(2) of the Law on Spatial Planning which prescribes obligation of municipalities to organize the public review of spatial plans within their competencies. The procedure for public discussion of the spatial and urban plans is further elaborated in the Ministry of Environment and Spatial Planning Administrative Instruction for Implementing the Spatial Planning Law on the procedure of Public Discussion for Spatial and urban Norms.

49. Finally, Article 4 of the Law on Spatial Planning prescribes that provisions of general administrative procedure shall govern implementation of spatial and urban planning.

50. According to the Article 85 of Law on Local Self Government, "the complaints of citizens against an administrative act of the municipal organs shall be reviewed in accordance with Law on Administrative Procedure".

51. As mentioned above both the Law on Spatial Planning and the Law on Local Self Government prescribe application of the Law on Administrative Procedure with regards to the issues regulated by these laws.

52. Article 127 of the Law on Administrative Procedure prescribes that the administrative appeal may be submitted in the form of request for review or an appeal and that any interested party has a right to appeal against an administrative act or against unlawful refusal to issue an administrative act.

53. On the other hand, Article 131 of the Law on Administrative Procedure prescribes that the competent administrative body shall review the administrative appeal and shall issue a decision in the course of 30 days upon submission of appeal. Furthermore, according to paragraph 2 of the same article if, upon the expiry of the deadline above no decision on the appeal has been issued by the competent administrative body, the interested party shall be given the right to address the court in conformity with the applicable law on civil procedure.

54. In order to approach the court it is necessary first to consider which court has jurisdiction with regard to the particular issue. In Republic of Kosovo the jurisdiction of the courts is

regulated by the old Yugoslav Law on Courts from 1978 (see Official Gazette No 21/78 SFRJ). Concerning administrative law issues, the Law on Courts states that "[t]he Supreme Court decides on legality of final administrative enactment in an administrative dispute"

55. While the general administrative decision-making process is regulated by the Law on Administrative Procedures, the Law on Administrative Disputes from 1977 (Official Gazette No 4/77 SFRJ) was applicable for the cases before the Supreme Court of Kosovo.

56. Turning to the present case, the Applicants complained on 13 July 2009 to the Municipal Assembly concerning the Decision of 30 April 2009 having been made without public participation. The Applicants have never received a reply to their petition of 13 July 2009, although it was signed by 393 residents of Jaglenica neighbourhood. Apparently it was simply ignored.

57. The Applicants then turned to the Ombudsperson, this Court and the Ministry of Environment and Spatial Planning. It should be recalled that an administrative dispute in the case of administrative silence may be initiated only against an administrative act "about the particular right of a particular persons or organization in an administrative matter." Consequently, the Law on Administrative Dispute that was applicable in the Republic of Kosovo appears not to allow for a judicial complaint unless there has been a direct violation of an individual's right or legal interest.

58. It is clear that the Decision of 30 April 2009 is not an "individual" decision; and as such the Applicants did not have at their disposal a judicial complaint before Supreme Court to challenge the Decision of 30 April 2009 with regard to the right guaranteed by Article 52 of the Constitution. The Law on Administrative Disputes provided no remedy to the Applicants.

59. Taking all of the above matters into consideration the Court is of the view, accordingly, that the Referral is admissible.

Merits

60. Article 52 (2) of the Constitution guarantees that:

> *"Everyone should be provided an opportunity to be heard by public institutions and have their opinions considered on issues that impact the environment in which they live."*

61. The right to a healthy environment is often classified in the so called "third generation rights." Third generation rights are rights which have attained international recognition as human rights but which are not easily classified as either civil and political rights or economic and social rights. They include rights such as the right to self-determination, the right to natural resources, the right to economic and social development and the right to intergenerational equity and sustainability.

62. In June 1992, the United Nations Conference on Environment and Development meeting in Rio de Janeiro (Brazil), adopted a Declaration ("the Rio Declaration on Environment and Development", A/CONF.151/26 (Vol. 1)) intended to advance the concept of States' rights and responsibilities with regard to the environment. "Principle 10" of this Declaration provides: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States

shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

63. On 25 June 1998, United Nations Economic Commission for Europe in application of Principle 10 of the Rio Declaration adopted so called the Aarhus Convention ("Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters", ECE/CEP/43). This Convention put an emphasis on promoting public participation in decision-making concerning issues with an environmental impact. In particular, provision is made for encouraging public participation from the beginning of the procedure for a proposed development, "when all options are open and effective public participation can take place". Due account is to be taken of the outcome of the public participation in reaching the final decision, which must also be made public.

64. On 27 June 2003, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1614 (2003) on environment and human rights. The relevant part of this recommendation states:

> *"9. The Assembly recommends that the Governments of member States:*
>
> *i. ensure appropriate protection of the life, health, family and private life, physical integrity and private property of persons in accordance with Articles 2, 3 and 8 of the European Convention on Human Rights and by Article 1 of its Additional Protocol, by also taking particular account of the need for environmental protection;*
>
> *ii. recognise a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level;*
>
> *iii. safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention;*

65. The European Court of Human Rights has given clear guidance that both Article 2 (the right to life) and Article 8 (the right to respect for the home, private and family life) include environmental protections. According to the jurisprudence of the European Court on Human Rights, where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake (see, Hatton and Others, cited above, para. 128). The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question (see, *mutatis mutandis*, Guerra and Others v. Italy, judgment of 19 February 1998, Reports 1998-I, p. 228, para. 60, and McGinley and Egan v. the United Kingdom, judgment of 9 June 1998, Reports 1998-III, p. 1362, para. 97). Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process (see, *mutatis mutandis*, Hatton and Others, cited above, para. 127).

66. Turning to the present case, it is undisputed between Parties that the Decision of 30 April 2009 was adopted without any public hearing or any other type of public participation.

67. It is clear therefore for the Court that the Applicants did not have an opportunity to be heard by public institution, i.e. the Opposing Party, and to have their opinions considered on issues that impact the environment in which they live.

68. While the Opposing Party expressed on several occasions that it is ready to discuss a the compromise solution, it did not in any meaningful way or at all address the Applicants' complaints regarding the violation of Article 52(2) of the Constitution.

69. The Court recalls the relevant background and in particular it refers to the relevant jurisprudence of the European Court of Human Rights that relates to the environmental protection. It further notes that "the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process (see, *mutatis mutandis*, *Hatton and Others*, cited above, para. 127)".

70. In the present case, as elaborated in the admissibility section above, the Applicants did not enjoy the required level of the environmental protection.

71. Accordingly, the Court finds that there has been a violation of Article 52(2) of the Constitution.

FOR THESE REASONS

THE COURT, based on Article 113.7 of the Constitution, Article 20 of the Law and Sections 54 and 55 of the Rules of Procedure,

DECIDES

I. *By a majority* vote that the Referral is admissible.

II. *Unanimously finds* that there has been a violation of the Applicants' right guaranteed by Article 52(2) of the Constitution of the Republic of Kosovo.

III. This Judgment shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

IV. HOLDS that, the Municipal Assembly of Prizren shall submit to the Court, within the period of six months, information about measures taken to enforce this Judgement.

V. The Judgment is effective immediately and it may be subject to editorial revision.

Judge Rapporteur **President of the Constitutional Court**

Altay Suroy Prof. Dr. Enver Hasani