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

Pristina, 14 December 2011
Ref. No.: RK177/11

RESOLUTION ON INADMISSIBILITY

in

Case no. KI 121/10

Applicants

Sitaram Chaulagai
Krishna Bandur Chamlagai
Chandra Kala Chauhan and
Hom Bahadur Battarai

Constitutional Review of the Decisions of the High Court for Minor Offence in Pristina, GJL.nos. 1258/2010, 1259/2010, 1260/2010, 1261/2010, dated 22 November 2010.

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

Applicants

1. The Applicants are: (1) Sitaram Chaulagai, (2) Krishna Bandur Chamlagai, (3) Chandra Kala Chauhan, and (4) Hom Bahadur, represented by Mr. Linn Slattengren, a practicing lawyer in Pristina.

Challenged court decision

2. The Applicants challenge the decisions of the High Court for Minor Offences in Pristina, GJL.nos. 1258/2010, 1259/2010, 1260/2010, and 1261/2010 of 22 November 2010.

Subject matter

3. The Applicants allege that the relevant court decisions show that they were discriminated against, contrary to Article 24 [Equality Before the Law] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") and that they were never given the opportunity to proof the factual situation before the relevant authorities, amounting to a violation of Article 32 [Right to Legal Remedies] of the Constitution.

4. They further complain that *"The High Court of Minor Offences and the Municipal Court of Minor Offence did not take into account the fact that an administrative appeal has been exercised at the administrative level against the decision issued by the Review Commission for Permanent and Temporary Residence Permits of MIA, on the basis of which the Directorate for Migration and Foreigners [DMF] deportation order was issued, nor did they take into account the facts, evidence or arguments that prove the contrary of what is said in the Review Commission for Permanent and Temporary Residence Permits of MIA and Court's decisions respectively."*

5. Furthermore, the Applicants request the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") to impose interim measures, postponing the deportation order, for the reason that the deportation would cause them material damage of 30.000 Euro, and that it would distress emotionally one of the Applicants, Ms Chandra Kala Chauhan, considering the fact that she was pregnant. She claims that her health and the health of her foetus would be seriously put in danger.

Legal basis

6. Article 113.7 of the Constitution, Articles 22 and 27 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: the "Law") and Rules 54, 55 and 56 (2) 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 3 December 2010, the Applicants submitted the Referral to this Court.

8. On 7 December 2010, the President, by Order No. GJR. 121/10, appointed Judge Iliriana Islami as Judge Rapporteur. On the same date, the President, by Order No.KSH. 121/10, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Almiro Rodrigues.

9. On 13 December 2010, the Court granted the Applicants' request for an interim measure, until the Court would have adjudicated the Referral.

10. On 11 January 2011, the Court received the reply from the High Court for Minor Offences, to which the Referral had been communicated for comments. The High Court emphasized that the Referral contained a host of deficiencies, be it procedurally or substantially.

11. On 12 January 2011, the Court requested clarification from the Review Commission for Permanent and Temporary Residence Permit in respect to its final decision.

12. On 24 January 2011, the Court received a clarification from the Review Commission for Permanent and Temporary Residence Permits, explaining that, on 11 November 2010, the Applicants appealed against the Commission's decision and that, on 30 November 2010, the Appeals Commission took a decision on the Applicants' appeal, in accordance with Article 46(1), item 1.3 of the Law No. 03/L-126, thereby rejecting the appeal. In the decision of 30 November 2010 the Applicants were informed that they had 30 days to initiate an administrative complaint before the Supreme Court.

13. On 24 May 2011, the Court requested additional clarification by the Applicants on the following issues:

    (1) whether, in accordance with Article 241-246 of the Law on Minor Offences, they had appealed against the decisions of the High Court for Minor Offences in Pristina, GJL.nos. 1258/2010, 1259/2010, 1260/2010, and 1261/2010 of 22 November 2010;
    (2) whether, in accordance with Article 228-233 of the same law, they had requested a repetition of the procedure.
    (3) if the answer would be positive to any of the questions, whether they had submitted details to that effect;
    (4) if the answer to these questions would be negative, whether they could explain the reasons for that.
    (5) whether they had filed any appeal with the Supreme Court against the decision of the Commission for Review of Foreigners Appeals, No. 1361, of 1 December 2010, and, if not, to explain the reasons for that.

14. On 1 June 2011, the Applicants replied, stating that:

"[...]

(1) We have submitted appeals against the decisions of the Municipal Court for Minor Offences to the High Court for Minor Offences which rejected our appeals and upheld the decisions of the first instance court. That exhausted our appeal rights under the law. After a careful legal analysis we considered that the request for protection of legality, made by us, was inadmissible. Thus, no request for protection of legality was filed.

(2) No proposal to repeat the procedure was filed with the competent court. Based on the factual background and circumstances or the matter, we considered that use of this extraordinary legal remedy was not admissible.

(3) We respectfully submit that we have never received a decision from the second instance administrative organ which serves as an appellate panel. We have filed an appeal against the decisions of the Commission for Review of the Permits for Temporary and Permanent Residence, acting as an administrative organ of the first instance, to the Appeals Commission for Temporary and Permanent Residence of Foreign Persons acting as an administrative appellate panel but no decision on this appeal was served to us or the claimants.

[...]"

15. On 10 June 2011, the Court requested additional clarification from the Review Commission, Appeals Committee, DMF, Municipal Court for Minor Offence and the High Court for Minor Offence on the following issues:

From DMF

(1) was the Deportation Order served upon the Applicants in a language that they understand? If not, why not?
(2) Have the Applicants been informed about the legal remedies available to them against the Deportation Order?

16. On 14 June 2011, DMF submitted to the Court the deportation order that was issued for the Applicants and sent to the Applicants in the English version and the Albanian version with the legal advice that the Applicants had the right to appeal against the deportation order within eight days, but that the appeal did not suspend the execution of the deportation order. Furthermore, DMF stated that the Applicants where notified verbally but had, in the presence of the attorney Mr. Bardhë Ademaj, refused to receive the deportation order.

From the Municipal Court for Minor Offence and High Court for Minor Offence

(1) was the judgment of the Court served upon the Applicants in a language that they understand?

17. On 22 June 2011, the High Court for Minor Offence replied stating that the judgment of the Court was served on the Applicants in English, pursuant to Article 17 of the Law (No. 02/L-37) on the use languages.

***From the Review Commission**:*

(1) whether the Applicants had been invited to the session of the Review Commission, where the evidence submitted by the DMH officials hds been discussed?
(2) whether the Decision of the Review Commission had been served on the Applicants in a language that they understand? If not, why not?

18. On 24 August 2011, the Review Commission replied, stating that:

"[...]

(1) The review commission had not invited the Applicants to the session of the Review Commission, because the Review Commission considered that there was no need to invite the Applicants to the session. The annulment of the residence permit had been done based on the police report, which was presented before the Review Commission and confirmed that the Applicants had violated the legal provisions of the Law on Foreigners.

(2) The decision taken by the Review Commission was sent to the Applicants in the Albanian language, because the Applicants had submitted the request for temporary residence permit in the Albanian language.

[...]"

From the Appeals Committee

(1) to submit the Minutes of the Appeal session, taken at the Committee's session, in accordance with Article 18 [Minutes of the Meeting], paragraph 1, of the Administrative Instruction No. 01/2010 – MIA of the Ministry of Internal Affairs.
(2) whether the Decision of the Appeals Committee had been served upon the Applicants in a language that they understand? If not, why not?
(3) How could the Applicants be aware of the possibility to initiate a judicial procedure before the Supreme Court, if the Decision of the Appeals Committee was not served upon the Applicants in a language that they understand?
(4) to submit a copy of the receipt showing that the Decision was served upon the Applicants.

19. On 24 August the Appeals Committee replied stating that:

"[...]

(1) The decision taken by the Appeals Committee was sent to the Applicants in the Albanian language, because the Appeals Committee was not obliged to do so and because the attorney of the Applicants submitted the complaint in the Albanian language and the mother tongue of the director of the law firm Interex Associates Mr. Bejtush Isufi was Albanian.

(2) According to the information given by officials of DMF, the decision was provided to the attorney of the Applicants which had refused to receive it.

..."

20. On 23 November 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

21. The first Applicant, Sitaram Chaulagai, a Nepalese citizen, came to Kosovo in October 2009 and established a business, the restaurant "Good Morning Global Group" in Pristina. He apparently obtained the necessary licence, whereafter he was joined, in early 2010, by the three other Applicants, who were issued a Foreigners Identification Card by the Ministry of Internal Affairs (hereinafter: "MIA") and a Temporary Residence Permit valid until 23 October 2010. They also received an Initial Work Permit from the Ministry of Labour and Welfare, which would expire on 21 October 2010, to work in the restaurant.

22. The restaurant "Goodmorning Global" opened a branch office as well, apparently registered under the name "Mount Everest Restaurant". This branch office was, however, discontinued for financial reasons and another branch was opened, the "Bollywood Restaurant", where the Applicants started to work.

23. On 4, 5 and 6 October 2010 inspectors of the Department of Migration and Foreigners of MIA conducted inspections at the business addresses of the restaurant "Good Morning Global" and the "Bollywood Restaurant". The DMF officials also contacted the Tax Inspectorate at the Ministry of Trade and Industry requesting information about the status of the "Bollywood Restaurant". According to the report submitted by the Tax Inspectorate, the "Bollywood Restaurant" had, according to its information, never had any turnover.

24. On 5 October 2010, three of the Applicants were requested to go to DMF, where their work and residence permits were confiscated, as well as their passports. On 6 October 2010, the same thing happened to the fourth Applicant.

25. On 9 October 2010, DMF filed a claim with the Municipal Court for Minor Offences in Pristina to initiate minor offences proceedings against the Applicants.

26. On 26 October 2010, the Review Commission for Permanent and Temporary Residence Permits of MIA issued decisions to terminate the temporary residence permit of each Applicant, for the reason that, based on the inspection reports of DMF of 4, 5 and 6 October 2010, the business, on the basis of which the temporary residence permits had been issued, did not exist. Furthermore, the Review Commission instructed DMF to issue Deportation Orders under Article 58 [Execution of Deportation] of the Law on Foreigners.

27. On 1 November 2010, the decision of the Review Commission was served on the Applicants, who submitted an appeal with the Appeals Committee of the Review Commission on 11 November 2010.

28. Also on 1 November 2010, DMF issued Expulsion Orders to the Applicants, which were apparently not accepted by the Applicants, for the reason that they were only in the Albanian language (N.B. copies of the expulsion orders in the English language were submitted by DMF to the Court with the following information written on the orders: "Person is notified verbally and refused to take a removal order in the presence of the lawyer").

29. The DMF officials instructed the Applicants to be present at the Minor Offences Court in Pristina on 9 November 2010.

30. On 8 November 2010, the Applicants were informed by DMF, that the Ministry of Labour and Social Welfare had rendered a decision annulling their work permits. Apparently, no such decision has been delivered to the Applicants, which would have enabled them to challenge the decision.

31. On 9 November 2010, the Applicants appeared before the Minor Offences Court in Pristina and requested the Court to reject the initiation of proceedings as inadmissible for the reason that they were premature, since their appeals against the decision of the Review Commission were still pending before the Appeals Committee. However, the Minor Offences Court declared the Applicants guilty of staying in Kosovo, while their residence permit had expired on 26 October 2010, fined each of them with a fine of 100 Euros and ordered their immediate deportation from the territory of Kosovo without a right to re-enter for a period of 2 years, pursuant to Article 58 of the Law on Foreigners.. According to Article 55(3) of the Law, an appeal against an order to leave shall not suspend the execution of the order. The Applicants appealed against these decisions to the High Court of Minor Offences.

32. On 22 November 2010, the High Court on Minor Offences rejected the appeals of the Applicants as unfounded. The High Court ruled that it had reviewed the allegations set out in the appeals, the challenged decisions and the statements of the Applicants deposited in the main hearing in the first instance court, on 9 November 2010, in which they partly admitted to having committed a minor offence, but argued that they did not accept to sign the decision on deportation, issued by DMF, because they didn't understand why it was issued, and that they didn't act on it. The High Court further reasoned that, based on other facts from the case files, also the factual situation was certainly ascertained as per the ruling of the appealed decision of the Municipal Court

and that, therefore, the submitted complaints were rejected as unfounded, while the challenged decisions were upheld as fair and based on the law.

33. The High Court concluded, that the first instance court did not violate the minor offence procedure provisions, respectively, nor did it erroneously apply the substantive law. It further ascertained that the imposed sentence for the Applicants and the issuance of the protection measure were determined according to the level of responsibility, therefore there was no legal basis for the abolishment of the challenged decisions, or the rejection of the request for the initiation of minor offence proceedings, as proposed by the Applicants and, respectively, the decisions for their forced and immediate deportation from the territory of the Republic of Kosovo. The High Court also informed the Applicants that no appeals were allowed against its decision.

34. On 30 November 2010, after having heard the Applicants, the Appeals Committee, dealing with the Applicants' appeals against the decision of the Review Commission of 26 October 2010, rejected their appeals, stating that the Review Commission had rendered rightful decisions based on the foreseen legal procedure, because the Applicants had failed to act in accordance with the legal provisions of the Law of Foreigners and the Administrative Instructions for the application of that Law. The Appeals Committee, therefore, unanimously decided, in accordance with Article 46(1)(3) of the Law on Foreigners, providing that the competent body may revoke the stay of a foreigner in Kosovo [...] who is granted a temporary stay, [...], if he/she stays in Kosovo contrary to the purpose for which the temporary stay is issued. It, therefore, upheld the decision of the Review Committee to reject the permit for temporary residence in Kosovo. The decision further indicated that the Applicants might initiate a judicial procedure before the Supreme Court within 30 days from the reception of the decision by the Applicants.

Applicants' allegations

35. The Applicants allege that the Review Commission for Permanent and Temporary Residence Permits inspected at the wrong address of the discontinued branch, and claim that their business still exists, even to the present day, which can be simply checked by visiting their premises.

36. They further allege that, when presented with the removal order, they had to engage a lawyer in order to find out what they were supposed to sign. They then went, together with the attorney, to DMF, where the attorney requested to be given the Expulsion Order, but the officials of DMF refused to do so, arguing that, since the Applicants had initially refused to accept the document, DMF could not now give the documents to the Applicants' representative. According to the Applicants' attorney, the Applicants were never served with the Deportation Order and, therefore, were not provided with the possibility to appeal. Instead, the officials of DMF had advised them to go to the Municipal Court for Minor Offences.

37. The Applicants further allege that it is evident that none of the requirements cited in Article 79 [Retention of Documents], paragraph 1, of the Law on Foreigners were met and that, consequently, the confiscation of their identity papers had no legal basis.

38. The Applicants also allege that the expulsion order is an administrative act, issued by the first instance administrative bodies, based on Article 128 of the Law on Administrative Procedure; hence the Appeals Commission within the MIA did not take into account the fact that, by exercising the legal remedy, the execution of the administrative act should have been suspended. Moreover, the Applicants allege that, pursuant to Articles 128(2)(a), (b), (c) and (d) of that Law, the administrative bodies had not submitted any evidence on the basis of which the exercise of the complaint procedure against the

competent administrative bodies would have been foreclosed. In their opinion, Article 128(3) obliges the administrative body to inform the party about the reasons for the non-suspension of the administrative act, which that body had not done.

39. Furthermore, the Applicants complain that the Municipal Court for Minor Offences did not take into account the fact that an administrative appeal was pending against the decision of the Review Commission to deliberate the complaints on the basis of which the Expulsion Order was issued by the DMF.

40. Moreover, the High Court of Minor Offences and the Municipal Court of Minor Offence ignored the fact that an administrative appeal had been exercised at the administrative level against the decision issued by the Review Commission for Permanent and Temporary Residence Permits of MIA, on the basis of which the Directorate for Migration and Foreigner had issued the removal order, nor did they take into account the facts, evidence or arguments that would have proven the contrary of what was said in the Review Commission and Court's decisions respectively.

41. Furthermore, the Applicants allege that their submissions were not taken into account, because they were the exact opposite of what was said in the decision of the Review Commission and that of the High Court for Minor Offences.

42. Mrs. Chandra Kala Chauhan, who was pregnant at the time of the submission of the Referral, alleges that her doctor has recommended her to rest, but did not recommend to her a bed regime, which implies that the Applicant can move around.

Assessment of the admissibility of the Referral

43. The Court notes that the Applicants complain about two issues:

    1. The administrative proceedings before the Review Commission and the Appeals Commission;

    2. The proceedings before the Municipal Minor Offences Court and the High Court for Minor Offences;

44. In this respect, in order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

45. These requirements are essentially: referring the matter to the Court in a legal manner (Article 113 (1) of the Constitution); having exhausted all legal remedies provided by law (Article 113 (7) of the Constitution); filing the referral within a certain deadline (Articles 49 and 56 of the Law); clarifying what rights and freedoms have been violated; indicating what concrete act(s) of a public authority is (are) subject to challenge (Article 48 of the Law); justifying the Referral; and, attaching the necessary supporting information and documents (Article 22 of the Law), including other elements of information.

1. As to the administrative proceedings

46. In order to be able to consider the Applicants' complaint about the administrative proceedings before the Review Commission and the Appeals Commission and their allegation that they have been denied the right to legal remedies as guaranteed by Article 32 of the Constitution, the Court considers that it is necessary to first examine whether the Applicants have exhausted all legal remedies available to them under applicable law.

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

"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".

48. This means that, as to the administrative proceedings before the Review Commission and the Appeals Commission, the Applicants should have shown to this Court to have exhausted all available remedies , including an appeal to the Adminstrative Chamber of the Supreme Court.

49. In this respect, the Court notes that the Decision of the Appeals Commission (Commission for Review of Foreigners Appeals) dated 30 November 2010, contains information about the legal remedy against its decision in the following terms: "Against this decision, within a period of 30 (thirty) days from its reception, the unsatisfied party may initiate an administrative conflict with the Supreme Court of the Republic of Kosovo".

50. When requested by this Court why the Applicants had not made use of this remedy, the Applicants' lawyer replied that no decision on this appeal was served to him or the Applicants.

51. However, when this Court requested the Appeals Committee "Whether the Decision of the Appeals Commission had been served upon the Applicants in a language that they understand and, if so, why not?", the Appeals Commission replied that "The decision has been sent to the Applicants in the Albanian language, because the Appeal Commission is not obliged to do so and because the lawyer of the Applicants submitted the complaint in the Albanian language and the mother tongue of the director of the law firm is Albanian". The Commission further mentioned that, "on 3 December 2010 the original of the decision has been given to the DMF. According to information given by the official of DMF, this decision has been placed at the disposal of the legal representative of the claimant [...], which refused to receive the decision. Copies of the decision have been stored with the Division for Foreigners [...]."

52. In these circumstances, the Court must come to the conclusion that the Applicants have not sufficiently substantiated that they were not at all aware of the outcome of the proceedings before the Appeals Commission or had no access to the text of its Decision. It follows that they have not complied with the above exhaustion rule, the rationale of which is to afford the authorities concerned, including the courts, the opportunity to prevent or remedy the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (see: Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, of 27 January 2010 and, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999).

2. As to the proceedings before the Municipal Court for Minor Offences and the High Court for Minor Offences

53. As to the complaint that the decisions of the Municipal Court of Minor Offence and of the High Court for Minor Offence violated the Applicants' rights guaranteed by:

a. Article 24 [Equality Before the Law] of the Constitution since the court, allegedly, only dealt with the technical matters and declared them guilty for not implementing

the Deportation Order, whereas it did not review at all the "arbitrary manner for the issuance of that decision"; and

b. Article 32 [Right to Legal Remedies] of the Constitution, since the Applicants were, allegedly, denied their right to a legal remedy at the administrative level, and did not have the possibility to prove to the Commission that the assessment of the factual situation was conducted in an entirely incorrect manner leading to the residence permit being revoked and the issuance of the deportation order,

the Court emphasizes that, under the Constitution, it is not to act as a court of fourth instance, when considering the decisions taken by ordinary courts. It is the role of ordinary courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis,* Garcia v. Spain [GC], no. 30544/96, para. 28, European Court of Human Rights [ECHR] 1999-I).

54. The Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicants has had a fair trial (see among other aorities, Report of the Eur. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).

55. In the present case, the Applicants merely dispute whether the Municipal Court for Minor Offences and the High Court for Minor Offences correctly applied the applicable law and disagree with the courts' factual findings with respect to their cases.

56. Having examined the proceedings before these courts as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

57. Taking into account the above considerations, it follows that the Referral as a whole must be rejected as manifestly ill-founded.

Assessment of the Request for Interim Measures

58. As to the Applicants' request for interim measures, which the Court granted on 13 December 2010, "until it would have adjudicated the Referral", the Court refers to Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, stipulating that, at any time when a Referral is pending before the Court and the merits of the Referral have not been adjudicated by the Court, a party may request interim measures. However, taking into account that the Referral was found inadmissible, the interim measures that were granted by this Court have now expired under Rule 55 (9) of the Rules of Procedure to request interim measures.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47.2 of the Law, and Rule 36 and 56 (2) of the Rules of Procedure, on 23 November 2011, unanimously

DECIDES

I. TO REJECT the Referral as inadmissible;

II. TO DECLARE that the Interim Measures have expired;

III. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur | **President of the Constitutional Court**

Dr. Iliriana Islami | Prof. Dr. Enver Hasani