



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

Prishtina, 4 August 2015
Ref. no.: AGJ 820/15

JUDGMENT

in

Cases No. KI144/14 and KI156/14

Applicants

Vilijamin Hajduković and Stanka Tus

**Constitutional Review of the non-execution of two decisions of the
Housing and Property Claims Commission, namely Decision
No. HPCC/REC/91/2007 of 19 January 2007, and Decision
No. HPCC/REC/81/2006 of 11 December 2006**

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 and
Bekim Sejdiu, Judge

Applicants

1. The first Referral was submitted by Mr. Vilijamin Hajduković, with residence in Belgrade, Republic of Serbia (hereinafter: the first Applicant), and the second Referral by Ms. Stanka Tus, with residence in Novi Sad, Republic of Serbia (hereinafter: the second Applicant).

Challenged Decisions

2. Both Applicants challenge the non-execution of decisions of the Kosovo Housing and Property Claims Commission (hereinafter: the HPCC). The first Applicant challenges the non-execution of Decision HPCC/REC/91/2007 of 19 January 2007. The second Applicant challenges the non-execution of Decision HPCC/REC/81/2006 of 11 December 2006.

Subject Matter

3. The subject matter of these Referrals is the constitutional review in respect of the non-execution of two HPCC decisions, the Decision HPCC/REC/91/2007 of 19 January 2007 and the Decision HPCC/REC/81/2006 of 11 December 2006.
4. Both Applicants allege that as a result of the non-execution of the above-mentioned decisions, their constitutional rights as guaranteed by: Article 3 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property], Article 53 [Interpretation of Human Rights Provisions], Article 54 [Judicial Protection of Rights] of the Constitution, and relevant articles of the European Convention of Human Rights (hereinafter: the ECHR), Article 6 paragraph 1 [Right to a fair trial], Article 13 [Right to an effective remedy], Article 14 [Prohibition of discrimination], Article 1 Protocol 1 ECHR [Protection of property], were violated.

Legal Basis

5. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 37 (1) and 56 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 24 September 2014, the first Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 7 October 2014, the President of the Court, by Decision GJR. KI144/14, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President, by Decision no. GJR. KI144/14, appointed the Review Panel, composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues (member) and Enver Hasani (member).
8. On 10 October 2014, the second Applicant submitted the Referral to the Court.
9. On 23 October 2014, the President, in accordance with Rule 37 (1) of the Rules of Procedure, ordered that the Referral of the second Applicant, registered under KI156/14 be joined to the Referral of the first Applicant, registered under the number KI144/14.

10. On 1 December 2014, the Court informed the Applicants and the Kosovo Property Agency (hereinafter: KPA), which is the legal successor to the Housing and Property Directorate (hereinafter: HPD), about the registration and the joinder of the Referrals.
11. On 26 June 2015 the President, by Decision Nr.K.SH.KI 144/14 & KI 156/14 appointed Judge Arta Rama-Harjizi as the member of the Review Panel instead of Judge Enver Hasani, whose mandate as Judge of the Constitutional Court expired on 26 June 2015.
12. On 3 July 2015, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

Summary of Facts regarding the Referral of the first Applicant

13. In 1992, the first Applicant was given occupancy rights to a socially-owned apartment located at the address Rasadnik, Str. Petar Prije G 2/5, in the Municipality of Peja. Subsequently, in late 1992, the first Applicant concluded a contract for the purchase of the apartment from the Socially-Owned Enterprise (SOE) "Boris Kidrič". The first Applicant certified the purchase in the Municipal Court of Peja on 29 December 1992, under ordinal number 8535/92.
14. Following the war in 1999, the first Applicant fled Kosovo and took up temporary residence in Belgrade. The apartment in Peja was subsequently occupied by a third party, B.B.
15. On 8 February 2002, the Applicant filed a claim [DS304087] to the HPD in which he requested the confirmation of his possession rights to the apartment, which had been in his possession until 1999.
16. On an unspecified date, the third party B.B. filed a claim [DS501273] to the HPD, in which he also requested the confirmation of his possession rights to the same apartment mentioned above.
17. The HPD referred both claims to the Housing and Property Claims Commission (HPCC).
18. On 18 June 2005, the HPCC rendered a collective Decision HPCC/D/197/2005/A & C, which included the two above-mentioned claims [DS3014087 and DS501273].
19. In its decision, the HPCC recognized to claimant DS501273 (i.e. the third party B.B.) the right of possession of the apartment, by which he acquired all the rights as the claimant of Category A under Section 4.2 of UNMIK/REG/2000/60.
20. By the same decision, the claimant in the claim DS304087 (i.e. the first Applicant) was denied the right to possession over the disputed apartment and, accordingly, he was recognized the rights to compensation as the claimant of Category C under Section 4.2 of UNMIK/REG/2000/60.

21. On 10 October 2005, the first Applicant submitted a request for reconsideration of the Decision HPCC/D/197/2005/A&C, of 18 June 2005. This request was rejected by the HPCC on 19 January 2007 with decision HPCC/REC/91/2007.
22. On 23 April 2007, the first Applicant again addressed the HPCC requesting the annulment of decision HPCC/REC/91/2007 of 19 January 2007. The first Applicant claimed that this decision was a collective decision regarding a number of requests for reconsideration, but that his request for reconsideration had not been included.
23. On 8 June 2007, the HPCC informed the first Applicant that his request for reconsideration had already been decided and his additional request was refused. The HPCC stated that, *“Following Section 14.1 of UNMIK Regulation 2000/60, which allows for only one reconsideration request from a party to a claim, you have exhausted your legal remedies and additional requests may not be processed”*.
24. On 12 January 2012, the first Applicant sent a letter to the KPA requesting the execution of the HPCC Decision HPCC/D/197/2005/A&C of 18 June 2005, in which he was recognized as a claimant of Category C, and became entitled to compensation pursuant to Section 4 of UNMIK/REG/2000/60.
25. On 7 March 2012, the KPA replied to the first Applicant’s request. The KPA stated, *inter alia*, that:

“Kosovo Property Agency (the Agency), which has inherited a part of the responsibility of the former Housing and Property Directorate (Directorate), wants to inform you that we have received your letter [...], by which you seek the compensation of the value of the apartment, related to the property located in Peja/Pec str. "Fidanishte" G-2, 1st floor, apartment no. 5.

As you already know, the Directorate has received two claims regarding the above mentioned property, and that is the claim of “C” category DS304087 which you have submitted, and the claim of “A” category, DS501273 submitted by Mr. B. B.

The Housing and Property Claims Commission (HPCC) took the decision no. HPCC/D/197/2005/A & C of 18 June 2005 by which the claimant of A category was recognized the right over the property upon payment of the amount provided for in section 4.2 of UNMIK Regulation 2000/60. If the claimant of A category uses this right you will get adequate compensation as the applicant of C category in accordance with the provisions of Section 4.2 of UNMIK Regulation 2000/60.

[...]

The Kosovo Property Agency has adopted the criteria and procedure of compensation and has made efforts to ensure adequate funding for the implementation of the provisions of Article 4 of UNMIK Regulation 2000/60 and decisions of the Commission related to this kind of requests, but so far failed to provide the necessary funds. The Agency will continue to

insist on the provision of funds, necessary to implement the compensation program. As soon as this is achieved, the Agency will contact you regarding the implementation of the Commission's decision."

Summary of facts regarding the Referral of the second Applicant

26. On 6 November 2012, with the death of her husband, Ms. Stanka Tus became the widow of Mr. Nikola Tus, referred to in all of the legal documents relevant to this Referral. For the purposes of this Referral, she will be referred to as the second Applicant.
27. Beginning on 1 April 1968, the second Applicant was allocated occupancy rights to a socially-owned apartment located at Muharrem Bekteshi Street, nn, No. 4, entrance II, in Peja.
28. The second Applicant occupied this apartment until 23 March 1991, when she was apparently evicted and the apartment became occupied by a third party, S.D. The second Applicant claims that she undertook various legal proceedings in order to recover her occupancy rights to the apartment until, in June 1999, she was compelled to flee Kosovo.
29. The third party, S.D., purportedly purchased the apartment at some unspecified time between 1991 and 1999 under the Law on Housing. Furthermore, at some unspecified time after 2000, S.D., purportedly sold the apartment to another party, A.G.
30. At some point after 2000, the second Applicant filed a claim with the HPD requesting the confirmation of her rights to use the apartment. Her claim was registered under number DS603997.
31. On 31 March 2006, the HPCC rendered its Decision (HPCC/D/252/2006/A&C), by which it confirmed that the second Applicant was the lawful rights holder for the use of the apartment. Consequently, the second Applicant was recognized the rights of a Category A claimant.
32. The third party (S.D.) who had occupied the apartment since 1991 had been registered with the HPD under number DS500011. This party was referred to by the HPCC as the "First Owner", and was recognized the rights of a Category C claimant. Regarding the purported sale of the apartment by this "First Owner", the HPCC stated in paragraphs 12 and 13 of its Decision that:

"12. As pointed out above, section 4 of UNMIK/REG/2000/60 does not apply where there has been a further valid sale from the First Owner to a further owner. This, however, is subject to an exception. In terms of sections 5.1 and 5.2 of UNMIK/REG/2000/60, a First Owner is prohibited from selling his or her apartment until the deadline for the lodging of claims referred to in section 3.2, or until the resolution of any claim under UNMIK/REG/2000/60 pertaining to that apartment, whichever is the later. Section 5.2 specifically provides that:

"Any contract relating to a sale, exchange or gift made in violation of this section shall be null and void.13.

"In each of Claim [...] DS603997 the "First Owner" purported to sell the property to a further owner. The sale took place after UNMIK/REG/2000/60 became effective and before the resolution of this claim under the said regulation. Each sale was accordingly entered into in breach of sections 5.1 and 5.2 of UNMIK/REG/2000/60 and is null and void. Accordingly, the apartments in question remained in the ownership of the "First Owners". Section 4 therefore applies to this claim."

33. On an unspecified date, the factual occupant of the apartment, A.G., submitted a request for reconsideration of the HPCC Decision of 31 March 2006, as a so-called "Interested Party".
34. On 11 December 2006, the HPCC rendered the collective Decision HPCC/REC/81/2006, in which it rejected the request for reconsideration and upheld its decision in first instance. In paragraph 50 of its decision, the HPCC addressed the claims related to the second Applicant's rights (referred to as the "Responding Party" in the quotation below) and stated, *inter alia*, that:

"50. In Claim Nos. DS603997 & DS500011 the Requesting Party is an Interested Party who did not participate in the first instance proceedings. In these proceedings the category A Claimant was granted repossession and the competing category C Claim was rejected. The Requesting Party avers that he acquired a property right over the claimed property based on a purchase contract concluded between her and the category C Claimant. The Requesting Party also avers, without proof, that the Responding Party, who is the successful category A Claimant in the initial decision, did not lose his property right as a result of discrimination but that he was dismissed because he lacked the qualifications of a mechanical engineer. The Commission has reviewed the evidence presented by both Parties and concludes that the category C Claimant was allocated the claimed property even though the administrative procedure to allocate the property had not yet been finalized. The category C Claimant thus entered the apartment unlawfully since he did not possess the required allocation decision and contract on use. These documents were only issued after he entered into the property. These circumstances too point to discrimination against the category A Claimant. The Commission accordingly confirms its finding that the Responding Party lost the claimed property due to discrimination."

35. On 14 August 2008, the second Applicant sent a letter to the Kosovo Property Agency, as the legal successor of the HPD, requesting the execution of the HPCC Decision confirming her category A status and granting her the restitution of the right to use the apartment.
36. On 4 September 2008, the KPA, by letter (Ref: 02044/08/ bi), responded to the second Applicant as follows:

"I would like to confirm the receiving of your claim of date 14 August 2008 for the restitution of the ownership, pertaining to the property that is

subject to the above mentioned claims (HPCC/D/252/2006, 31 March 2006). By this we notify you that the first instance proceedings, the Commission rendered decision (HPCC/D/252/2006, of 31 March 2006) that restituted to you the ownership over the contentious property. However, a second party submitted to the HPCC of the Housing and Property Directorate (hereinafter: HPD) a reconsideration request of the first instance decision. The HPCC rejected this reconsideration request and upheld its first instance decision. We have also notified you that the decision of the Commission is effective on the day the HPD specifies the amount that should be paid by the claimant for the apartments pursuant to Article 4.2 of UNMIK Regulation 2000/60.

The proceedings respectively the compensation percentage for this type of claims pertaining to the group of mutual compensation has not been established yet. The KPA which inherited the responsibilities of the previous HPD will notify you in due time on the compensation proceedings and after that the restitution of the property under your ownership [...]"

37. On 23 February 2012, the second Applicant again addressed the KPA with a new letter, requesting the enforcement of Decision HPCC/REC/81/2006, of 11 December 2006.
38. On 5 March 2012, by a new letter (Ref. 00327/12/fk/II), the KPA responded to the second Applicant in an almost identical manner as in its previous letter (Ref. 02044/08/bi), of 4 September 2008. With regard to the method for determining the compensation to be paid, the KPA stated that:

"The KPA has adopted the compensation criteria and proceedings and has also made efforts to acquire the required funds in order to execute the provisions of Article 4 of UNMIK Regulation 2000/60 and the HPCC decisions pertaining to this type of claims, but so far the necessary funds have not been acquired. The KPA will continue to insist in acquiring the necessary funds to implement the compensation program. As soon as this is achieved the KPA will contact you regarding the execution of the HPCC decision."

39. On 28 August 2012, the second Applicant addressed by letter the coordinator of the EULEX mission for property issues, requesting that EULEX uses its powers to expedite the procedure at the KPA in order that the Decision HPCC/REC/81/2006, of 11 December 2006 is executed.
40. On 20 September 2012, the coordinator of the EULEX Mission for property issues responded to the second Applicant. In the response, he stated:

*"[...] Regarding your appeal we wish to remind you that pursuant to Article 22 of the Constitution of Kosovo it is provided that the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols are directly applicable in Kosovo.
[...]"*

Additionally, we advise you that pursuant to the case law of the European Court of Human Rights it has been established that the execution of any decision rendered by any independent and impartial court must be considered as an integral part of the right to a fair public hearing.

Therefore, if you consider that your constitutional right to a fair public hearing, including the execution of the decision rendered to your benefit, has been violated as a result of the failure of competent institutions of the rule of law in Kosovo to execute the above mentioned decision, than we advise you that you are entitled to submit a Referral to the Constitutional Court of Kosovo to protect your property rights.”

41. On 13 September 2012, the second Applicant submitted a request to the Ombudsperson Institution of Kosovo, in order to protect his rights and to accelerate the procedure of execution of the HPCC decisions. This request was registered under number 388/2012 and, on 21 September 2012, it was declared admissible by the Ombudsperson Institution.
42. On 22 July 2013, the second Applicant again addressed the KPA in order to inform them of the death of her husband and to reiterate her request for execution of the decisions of the HPCC awarding her category A status and the right to restitution of the apartment in Peja. There is no record in the file of a response from the KPA to this letter.
43. On 24 July 2013, the Ombudsperson Institution, informed the second Applicant of the results of its investigation. The Ombudsperson Institution states, *inter alia*, that:

“On 31 January 2013 the Ombudsperson received an answer from the KPA, where it is specified that the claim of Mr. Tus is awaiting the realization from the KPA and that the Agency together with the Government of Kosovo and donors are making all efforts to establish the funds to implement these decisions, but that currently they are not able to specify the date when the decision pertaining to the claim of Mr. Tus will be fulfilled.

[...]

Considering that the case of Mr. Tus was solved in accordance with Article 20, item 1.3 of Law No.03/L-195 on Ombudsperson, the latter decided to terminate the investigation in this case.”

Applicants’ Allegations

44. Both the first and the second Applicant claim that in the existing legal system in Kosovo there is no effective legal remedy on the basis of which it would be possible in these cases to prevent further violation of the rights guaranteed by the Constitution (except to address the Constitutional Court of Kosovo) which would provide legal redress to remedy the unfounded delay of the execution of the HPCC decisions, in accordance with Section 1.4 of UNMIK Regulation 2000/60.
45. Both Applicants address the Court with the request:

- I. *That the Court declares the Referrals admissible*
- II. *That the Court holds the specified violations of the Constitution of the Republic of Kosovo, committed against both Applicants:*

- *Article 24 [Equality Before the Law]*
- *Article 31 [Right to Fair and Impartial Trial]*
- *Article 32 [Right to Legal Remedies]*
- *Article 46 [Protection of Property]*
- *Article 54 [Judicial Protection of Rights]*

46. As well as the violations of the European Convention of Human Rights and its Protocols:

- a) Right to a fair trial pursuant to Article 6, paragraph 1 of the Convention, b) Right to an effective remedy under Article 13 of the Convention, c) Right to peaceful enjoyment of property under Article 1, Protocol 1 of the Convention, d) Right to enjoy the rights and freedoms set forth in the Convention without discrimination on any grounds pursuant to Article 14 of the Convention, e) Right to home and family life pursuant to Article 8 of the Convention.

47. The first Applicant also requests: *“On the basis of found violations of the rights guaranteed by the Constitution and laws to be awarded compensation for material and non-material damage.”*

48. The second Applicant also requests *“That the Court orders the KPA TO URGENTLY enable the execution of its decision – eviction of the illegal occupant and enable the possession of the apartment to the legal holder of the right of occupancy – here the Applicant”.*

Relevant legal provisions

49. UNMIK REGULATION NO. 2000/60 of 31 October 2000 ON RESIDENTIAL PROPERTY CLAIMS AND THE RULES OF PROCEDURE AND EVIDENCE OF THE HOUSING AND PROPERTY DIRECTORATE AND THE HOUSING AND PROPERTY CLAIMS COMMISSION

Section 4 RESTITUTION OF OCCUPANCY RIGHTS TO SOCIALLY OWNED APARTMENTS LOST AS A RESULT OF DISCRIMINATION

4.1 This section applies to any occupancy right to a socially-owned apartment which was cancelled as a result of discrimination.

4.2 As an exception to section 3.3, in relation to a socially owned apartment which was subsequently purchased from the allocation right holder by the current owner under the Law on Housing (hereafter “First Owner”), the following rules shall apply:

(a) The claimant has a right to the ownership of the apartment upon payment to the Directorate of:

(i) The purchase price for the apartment contained in the contract of sale concluded by the First Owner; or

(ii) The price at which the claimant would have been entitled to purchase the apartment under the Law on Housing but for the discrimination (whichever is determined by the Directorate to be less), plus a percentage of the current market value of the apartment, as determined by the Directorate, and the cost of any improvements made to the apartment by the First Owner.

(b) To exercise the right to restitution in kind, the claimant must pay the sum referred to in section 4.2(a) to the Directorate within 120 days of the Commission's decision on the right to restitution. Upon the claimant's application, the Directorate may extend the deadline by up to 120 days if not extending it would result in undue hardship to the claimant. Upon payment of this sum, the Commission shall issue a decision awarding ownership of the apartment to the claimant; and

(c) Money paid under section 4.2(b) will be held by the Directorate in a trust fund. A First Owner who loses the ownership of an apartment under this section will upon request be compensated by the Directorate from the trust fund for the amount s/he paid for the purchase of the apartment, a percentage of the current market value of the apartment, as determined by the Directorate, as well as for the cost of any improvements s/he made to the apartment. Any outstanding obligations of the First Owner under the Law on Housing are cancelled.

4.3 Except as provided in the previous section, no person whose rights are affected by a decision of the Commission awarding restitution in kind shall be entitled to any form of compensation.

4.4 Any claimant found by the Commission to have a right to restitution of a socially owned apartment, but who is not awarded restitution in kind in accordance with section 4.2, shall be issued a certificate by the Directorate stating the current market value of the apartment in its current condition, minus the amount which the claimant would have been required to pay for the purchase of the apartment under the Law on Housing. The Directorate shall establish formulae for determining these amounts and the amounts referred to in sections 4.2(a) and (c).

4.5 Any person with a certificate under section 4.4 shall be entitled to fair compensation proportionate to the amount stated in the certificate, to be paid from such funds as may be allocated in the Kosovo Consolidated Budget or any fund set up for this purpose under the present regulation. The method of calculation and payment of such compensation shall be established in subsequent legislation.

Admissibility of the Referral

50. In order to be able to adjudicate the Applicants' Referrals, the Court first needs to examine whether the Applicants have met the admissibility requirements provided by the Constitution, and further specified in the Law and Rules of Procedure.
51. With respect to the Applicants' Referrals, 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*".
52. In this respect, the Applicants have exhausted all legal remedies, provided by law, and due to lack of any other available effective remedy, they have addressed the Constitutional Court with the request for execution of their respective decisions of the Housing and Property Claims Commission, namely Decision no. HPCC/REC/91/2007 of 19 January 2007, and Decision no. HPCC/REC/81/2006 of 11 December 2006.
53. The Court also refers to Article 49 of the Law, which provides that: "*The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced*".
54. The Court wishes to reiterate that the requirement for the submission of the Referral within the time limit of four (4) months does not apply in the case of the non-execution of the decisions by the public authority (see, *mutatis mutandis*, *Iatridis v. Greece* No. 59493/00, ECHR, Judgment of 19 October 2000). The ECHR explicitly noted, in a similar situation arising in *Iatridis v. Greece*, that the time limit rule does not apply where there is a refusal of the executive to comply with a specific decision.
55. The Court also refers to Article 48 of the Law, which provides that: "*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*".
56. Regarding the fulfillment of this requirement, the Court notes that the Applicants have accurately specified what rights, guaranteed by the Constitution have allegedly been violated to them, by non-execution of the HPCC Decisions in their cases.
57. The Court notes that the Applicants may legitimately claim to be the victims of the non-execution of the HPCC Decisions.
58. In sum, the Court considers that the Applicants are authorized parties; all legal remedies have been exhausted; the requirement of the legal deadline as a result of a continuing situation was met, and that they have accurately clarified the alleged violation of rights and freedoms and they have referred to the ECHR case law, for exercising their rights to enjoy and possess the property.

59. Since the Applicants have fulfilled the procedural requirements, provided by the Constitution, the Law and the Rules of Procedure, the Court considers that the Referral is admissible for review on the merits.

Merits of the Referral

60. The Court notes that the Applicants allege violation of their constitutional rights, guaranteed by Article 3 [Equality before the Law]; Article 32 [Right to Legal Remedies]; Article 46 [Protection of Property]; Article 53 [Interpretation of Human Rights Provisions]; Article 54 [Judicial Protection of Rights]; as well as by the respective Articles of the European Convention of Human Rights, Article 6 paragraph 1 [Right to a fair trial]; Article 13 [Right to an effective remedy]; Article 14 [Prohibition of discrimination]; Article 1 of Protocol 1 of ECHR [Protection of Property].
61. In these cases, the Court will examine the merits of the Referral, pursuant to Article 31 in conjunction with Article 6.1 of ECHR, Article 46 of the Constitution in conjunction with Article 1 of the Protocol 1 of ECHR and Article 54 of the Constitution [Judicial Protection of Rights].

As to alleged violation of the right to fair and impartial trial

62. The Court notes that the Applicants mainly allege that the delay and non-execution of the Decision no. HPCC/REC/91/2007, of 19 January 2007, and the Decision HPCC/REC/81/2006, of 11 December 2006, violate their rights to a fair trial.
63. In this regard, the Court refers to Article 31 of the Constitution, which provides:
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 or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law“.*
64. In addition, Article 6.1 [Right to a fair trial] of ECHR provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

65. Moreover, the Court refers to Article 54 of the Constitution, which provides:

“Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.”

66. In the present cases, under UNMIK Regulation 2006/50, as amended and supplemented by Law no. 03/L-079 of the Republic of Kosovo, the Court finds that the KPA is the only responsible and competent authority for the execution of the decisions of the HPCC and of the decisions of the Kosovo Property Claims Commission of the KPA. This fact was confirmed also by the KPA representatives, who participated as a party in the public hearing held on 10 March 2014 in the Constitutional Court of the Republic of Kosovo, in case no. KI187/13.

67. As to the first Applicant, the Court notes that the Decision of the HPCC no. HPCC/REC/91/2007 of 19 January 2007, recognized his rights as a claimant of Category C, and accordingly he was entitled to all the rights provided by UNMIK Regulation 2000/60, Section 4.2, under c, which states, *inter alia*, that:

“[...] The Applicant of C category who loses the ownership of an apartment under this section will upon request be compensated by the Directorate from the trust fund for the amount s/he paid for the purchase of the apartment, a percentage of the current market value of the apartment, as determined by the Directorate, as well as for the cost of any improvements s/he made to the apartment. [...]”

68. Accordingly, the Court established that the first Applicant, by HPCC Decision no. HPCC/REC/91/2007 of 19 January 2007, was recognized the right to compensation, which he has not yet received despite the expiry of the reasonable time limits, which are related to the right to a fair trial.

69. As to the second Applicant, the Court notes that the HPCC Decision no. HPCC/REC/81/2006, of 11 December 2006, recognized her rights as a Category A claimant, and accordingly she was entitled to all the rights acquired on this basis, which are provided by UNMIK Regulation 2000/60, Section 4.2, under a.

70. Accordingly, based on the review of Decision HPCC/REC/81/2006, of 11 December 2006, the Court notes that the HPCC conclusively determined that the second Applicant was granted the right to use the apartment, which she would be able to achieve after payment of a specified amount to be determined by the HPD (now KPA), all within 120 days, as provided by UNMIK Regulation 2000/60 Section 4.2, under a, which states:

“(a) The claimant has a right to the ownership of the apartment upon payment to the Directorate of:

(i) The purchase price for the apartment contained in the contract of sale concluded by the First Owner; or

(ii) The price at which the claimant would have been entitled to purchase the apartment under the Law on Housing but for the discrimination (whichever is determined by the Directorate to be less), plus a percentage of the current market value of the apartment, as

determined by the Directorate, and the cost of any improvements made to the apartment by the First Owner.”

71. In seeking the execution of these decisions, the Applicants approached the KPA, as the HPD successor, several times, in writing, requesting to have the abovementioned decisions executed. Furthermore, the second applicant also approached other institutions of the Republic of Kosovo. The Applicants have continuously made efforts to exercise their right in an institutional way, but even after more than seven years, this right has not been executed.
72. In this regard, the Court notes it would be meaningless if the legal system of the Republic of Kosovo allowed that a final judicial decision remains ineffective in disfavor of one party. Interpretation of the above Articles exclusively deals with the access to court. Therefore, the non-effectiveness of procedures and the non-implementation of the decisions produce effects that raise situations that are inconsistent with the principle of the Rule of Law (Article 7 of the Constitution), a principle that the Kosovo authorities are obliged to respect (see ECHR Decision in the case *Romashov v. Ukraine*, Submission No. 67534/01. Judgment of 25 July 2004).
73. The Court considers that the execution of a decision rendered by a court should be considered as an integral part of the right to a fair trial, a right guaranteed by the abovementioned articles (*see case Hornsby v. Greece, ECtHR Judgment of 19 March 1997, reports 1997-II, p. 510, par. 40*). In this specific case, the Applicant should not have been deprived of the benefit of the execution of a final decision, which is in their favor.
74. No authority can justify the non-execution of decisions, intending to obtain revision and fresh review of the case (*see, Sovtranstvo Holding against Ukraine, No. 48553/99, § 72, ECHR 2002-II, and Ryabykh v. Rusia, No. 52854/99, § 52, ECHR 2003-IX*).
75. Competent authorities, therefore have an obligation to organize an efficient system for implementation of decisions which are effective in law and practice, and should ensure their implementation within reasonable time, without unnecessary delays (*see Pecevi v. former-Republic of Yugoslavia and Macedonia, no. 21839/03, 6 November 2008; Martinovska v. Former Republic of Yugoslavia and Macedonia, no. 22731/02, 25 September 2006*).
76. The Court emphasizes that it is not its duty to determine what is the most appropriate way for the KPA to find efficient mechanisms of execution, within its competences, in the sense of completely fulfilling the obligations it has under the Law and the Constitution. However, every individual is entitled to judicial protection in case of the violations or denials of any rights guaranteed by the Constitution or by law (see Article 54 of the Constitution). In this regard, the Court notes that UNMIK Regulation 2000/60 in Section 4.2, under c, provided for the establishment of a fund (see paragraph 63, item 5) as one of the possible mechanisms for the enforcement of its decisions: “*Money paid under section 4.2 (b) will be held by the Directorate in a trust fund [...]*”.

77. Likewise, based on the review of the annual report on the work of the Kosovo Property Agency of 2013, the Court notes that on page 24, in section 5.B. *Implementation and compensation schemes*, it is stated, "[...] that in order to finance and pay, a special fund was established under the Ministry of Finance of the Republic of Kosovo."
78. The Court wishes to emphasize that in the case KI187/13, it has already dealt with the constitutional review of HPCC decisions and that on 1 April 2014 it rendered the judgment in which it held that there has been a violation of Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR and Article 54 of the Constitution, as well as a violation of the Applicants' right to the peaceful enjoyment of their property, as guaranteed by Article 46 of the Constitution and Article 1 of Protocol 1 of ECHR (*see case: KI187/13 N. Jovanović, Constitutional review regarding non-execution of the Decision GSK-KPA-A-001/12 of the Appellate Panel of the Supreme Court, of 8 May 2012, and of the Decision of Kosovo Property Claims Commission no. HPCC/D/A/114/2011, of 22 June 2011*).
79. The Court considers that the complexity of establishing a system of sub-legal acts and funds for the execution of the decision in accordance with Section 4 of UNMIK Regulation 2000/60 could be achieved in a period of fourteen (14) years, and further delay is not a valid reason which would justify the non-implementation of legal measures that have been established by the mandate, firstly of the HPD and subsequently of the KPA.
80. Therefore, the burden of non-execution and non-finding of the appropriate mechanisms for the execution of these two final decisions, the Decision no. HPCC/REC/91/2007 of 19 January 2007 and the Decision HPCC/REC/81/2006, of 11 December 2006, falls solely on the KPA. Lack of implementation mechanisms of this institution should not in any way be a reason for denial of the rights of the Applicants to the enjoyment of their property.
81. Accordingly, the Court is of the view that the KPA, as the legal successor of the HPD, in terms of the assumed rights and obligations, has the obligation to execute the decisions of the HPCC, and inherited all claims arising during the mandate of the HPD, which under the law were transferred as an obligation to KPA.

As to the alleged violation of the right to protection of property

82. The Applicants allege that there has been violation of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of ECHR.

Article 46 [Protection of Property] of the Constitution provides:

- 1) *The right to own property is guaranteed.*
- 2) *Use of property is regulated by law in accordance with the public interest.*

3) *No one shall be arbitrarily deprived of property (...)*”

[...]

Article 1 of Protocol no. 1 of ECHR provides:

„Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties“.

83. Regarding the alleged violations related to the protection of property, the Court finds that the decisions of the HPCC represent a legitimate expectation for the Applicants to have the right to that property. Thus, the Applicants have the right to peacefully enjoy the abovementioned property, as guaranteed by Article 1 of Protocol no. 1 of the European Convention. Under these circumstances, they are denied the right to enjoy and possess the property (see: *mutatis mutandis, Gratzinger and Gratzingerova v. the Czech Republic (dec.)*, no. 39794/98, para 73, ECHR 2002-VII).
84. Therefore, the Court finds that as a consequence of the non-execution of the decisions HPCC/REC/91/2007 and HPCC/REC/81/2006, the Applicants have been denied their right to the peaceful enjoyment of their possessions, in violation of Article 46 of the Constitution, and of Article 1, Protocol 1, of the ECHR.

CONCLUSION

85. In conclusion, the non-execution of HPCC decisions by KPA and the failure of the competent authorities of the Republic of Kosovo to provide effective mechanisms, in terms of the execution of a final decision, is contrary to the principle of the rule of law and constitutes a violation of fundamental human rights guaranteed by the Constitution.
86. Under these circumstances, the Court concludes that the non-execution of the final decisions, the Decision no. HPCC/REC/91/2007 of 19 January 2007, and the Decision no. HPCC/REC/81/2006, of 11 December 2006, constitutes a violation of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR and Article 54 of the Constitution.
87. Moreover, the Court notes that, because of delays and non-execution of the Decision no. HPCC/REC/91/2007 of 19 January 2007 and of the Decision no. HPCC/REC/81/2006, of 11 December 2006, the Applicants were unjustly deprived of their right to their property. In this way, the rights of the Applicants

to the peaceful enjoyment of their property, guaranteed by Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR, were violated.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rule 56 (1) of the Rules of Procedure, in the session held 4 August 2015, unanimously,

DECIDES

- I. TO DECLARE the Referral admissible;
- II. TO HOLD that there has been violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR;
- III. TO HOLD that there has been a violation of Article 54 of the Constitution;
- IV. TO HOLD that there has been violation of Article 46 of the Constitution in conjunction with Article 1 Protocol 1 of the ECHR;
- V. DECLARES that the Decision no. HPCC/REC/91/2007, of 19 January 2007, and the Decision no. HPCC/REC/81/2006, of 11 December 2006, are to be executed by the Kosovo Property Agency (KPA);
- VI. ORDERS the Kosovo Property Agency (KPA), that in accordance with Rule 63 of the Rules of Procedure of the Court, to notify as soon as possible, but not later than within six (6) months, the Constitutional Court regarding the measures taken to implement the Judgment of this Court;
- VII. TO NOTIFY this Judgment to the Parties;
- VIII. TO PUBLISH this Judgment in the Official Gazette, in accordance with Article 20 (4) of the Law;
- IX. TO DECLARE this Judgment effective immediately.

Judge Rapporteur


Snezhana Botusharova

President of the Constitutional Court


Arta Rama-Hajrizi