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

Pristine, 20 March 2012
Ref. No.: RK215/12

RESOLUTION ON INADMISSIBILITY

in

Case no. KI 147/11

Applicant

Maria Strugari

Constitutional Review of the Decision of the High Court for Minor Offence in Pristina, GJL. no. 1288/2011, dated 28 October 2011.

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

Applicant

1. The Applicant is Ms. Maria Strugari, represented by Mr. Armend Krasniqi, a practicing lawyer in Pristina.

Challenged court decision

2. The Applicant challenges the decisions of the High Court for Minor Offences in Pristina, GJL. no. 1288/2011 of 28 October 2011, which was served on the Applicant on 10 November 2011.

Subject matter

3. The Applicant alleges that the High Court decision shows that she was discriminated against, contrary to Article 24 [Equality Before the Law] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") and that she was never given the opportunity to prove the factual situation before the relevant authorities, amounting to a violation of Article 32 [Right to Legal Remedies] of the Constitution.

4. Furthermore, the Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") to impose interim measures, postponing the deportation order, for the reason that it *"is necessary. On the other hand, with imposition of temporary measure, none of the parties would suffer damages that are big and irreparable."*

Legal basis

5. 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

6. On 11 November 2011, the Applicant submitted the Referral to this Court.

7. On 14 November 2011, this Court requested additional clarification by the Applicant on the following issues:

"...

a. Evidence on work permit of Ms. Maria Strugari with duration until 2012;
b. Evidence on permission for stay of Ms. Maria Strugari with duration until 2012;
c. Employment Contract of Ms. Maria Strugari;
d. Whether the employment contract of Ms. Maria Strugari has been deposited with other institutions;
e. Have you requested to impose interim measure with the Municipal Minor Offence Court in Prizren and with the High Court of Minor Offences in Pristina; and
f. Have you requested to impose interim measure with the Supreme Court pursuant to Article 22 of the Law No. 03/L-202 on Administrative Conflicts.
g. Justify accurately the allegations for violations of constitutional rights to detriment of your client.

..."

8. On 14 November 2011, this Court communicated the Referral with the Ministry of Internal Affairs (hereinafter: "MIA").

9. On 16 November 2011, the Applicant replied, stating that:

"...

a. [...] The applicant has been extended with a Work Permit for another year until 22.06.2012.
b. She does not possess a Permit of Stay, [...]. However, since she has been extended the Work Permit for a period of one year from 22.06.2011 until 22.06.2012, she has applied for the extension of temporary Permit of Stay in RKS, for a period of time equivalent to the validity period of Work Permit, but her request has been rejected by the MIA, from the both instances, the first and second instance. Upon the submission of the appeal to the decision of the first instance, the second instance has not reviewed and examined the evidences provided by the appellant, but has a priori decided to reject the appeal as unfounded. Therefore against this Verdict the appellant has submitted the law-suit for the initiation of Administrative contest in the Supreme Court of Kosovo-RKS, wherein the subject is being examined.
c. Following, we send the Work Contract of the applicant.
d. Please see the appeals submitted by the applicant wherein can be obviously seen that we have sent to the Second Instance of MIA, the Copy of the Work Contract.
e. We have not requested interim measure with the Court for Minor Offenses in Prizren [...].

..."

10. On 13 January 2012, the President, with Decision No. GJR. 147/11, appointed Judge Robert Carolan as Judge Rapporteur. On the same date, the President, with Decision No.KSH. 147/11, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Gjyljeta Mushkolaj and Iliriana Islami.

11. On 2 February 2012, this Court communicated the Referral with the Review Commission for Permanent and Temporary Residence Permit (hereinafter: the "Commission") and Appeals Committee of the Review Commission (hereinafter: the "Appeals Committee").

12. On 2 February 2012, this Court communicated the Referral with the Department of Migration and Foreigners of MIA (hereinafter: "DMF"), Municipal Court for Minor Offence in Prizren and the High Court for Minor Offence in Pristina.

13. On 2 February 2012, this Court communicated the Referral with the Department of Citizenship and Asylum in MIA and requested information whether they have decided on the Applicant's complaint of 15 September 2011, and it replied on 15

February 2012, stating that a complaint does not stop the Deportation Order and that the Appeals Committee approved the deportation order on 21 September 2011.

14. On 20 March 2012, 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

15. The Applicant, Maria Strugari, a Moldavian citizen, came to Kosovo in 2001 to work in a restaurant in Prizren. She was issued a Foreigners Identification Card by MIA and a Temporary Residence Permit valid until 22 June 2011. The Applicant also received an Initial Work Permit from the Ministry of Labour and Welfare, which would expire on 22 June 2011 but was extended until 22 June 2012.

16. On 21 June 2011, the Applicant filed a request with the DMF to extend the temporary residence permit.

17. On 26 July 2011, the Commission rejected the Applicant's request reasoning that based on evidence submitted by the Applicant, she does not fulfill the requirements foreseen by Article 36 para. 3 and Article 38 para. 1 subpara. 1.1 of the Law No. 03/L-126 on Foreigners.

18. On 29 July 2011, the Applicant submitted an appeal with the Appeals Committee.

19. On 8 August 2011, the Appeals Committee, dealing with the Applicant's appeal against the decision of the Review Commission of 26 July 2011, rejected her appeal, stating that the Review Commission had rendered rightful decisions based on the foreseen legal procedure, because the Applicant had failed to act in accordance with the legal provisions of the Law of Foreigners,

    Article 7, of the Law of Foreigners provides:

    A foreigner shall adhere to the laws and regulations, including subsidiary legal acts, and to the decisions of state bodies during his/her stay and movement in the Republic of Kosovo.

    Article 36 para. 3, of the Law of Foreigners provides:

    Request for an extension for a temporary stay shall be submitted to the competent body at least thirty (30) days prior to the expiration of his/her temporary stay.

    Article 38 para. 1, subpara. 1.1, of the Law of Foreigners provides:

    The foreigner may be permitted temporary stay if he/she: possesses sufficient means for living;

The Appeals Committee, therefore, upheld the decision of the Review Committee to reject the request to extend the permit for temporary residence in Kosovo. The decision further indicated that the Applicant might initiate a judicial procedure before the Supreme Court within 30 days from the reception of the decision by the Applicant.

20. On 9 September 2011, General Police Directorate of MIA issued an Expulsion Order to the Applicant, in accordance with the Law on Foreigners, Article 46(1)(3), 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, and Article 55(2) and (3), providing that [...] the time required to prepare for his/her departure [...] shall [...] be [...] no [...] longer than thirty (30) days and [...]" An appeal against an order to leave shall not suspend the execution of that order. The Expulsion Order further indicated that the Applicant have the right to file a complaint with the Department of Citizenship and Asylum in MIA within 8 days from the reception of the decision by the Applicant.

21. On 15 September 2011, the Applicant filed a complaint with the Department of Citizenship and Asylum in MIA.

22. On 20 September 2011, the Applicant initiated an administrative conflict procedure before the Supreme Court, which so far has not yet rendered a decision in the matter.

23. On 21 September 2011, the Appeals Committee approved the deportation order (Decision No. 140/2011).

24. On 27 September 2011, DMF filed a claim with the Municipal Court for Minor Offences in Prizren to initiate minor offences proceedings against the Applicant.

25. On 27 September 2011, the Applicant appeared before the Minor Offences Court in Prizren and requested the Court to reject the initiation of the proceeding as inadmissible for the reason that it was premature, since her appeal against the decision of the Appeals Committee was still pending before the Supreme Court. However, the Minor Offences Court declared the Applicant guilty of staying in Kosovo, while her residence permit had expired on 22 June 2011, fined her with a fine of 50 Euros and ordered her immediate deportation from the territory of Kosovo without a right to re-enter for a period of 3 years. According to Article 55(3) of the Law, an appeal against an order to leave shall not suspend the execution of the order (Decision No. 176/2011-01). The Applicant appealed against this decision to the High Court of Minor Offences.

26. On 28 September 2011, the High Court on Minor Offences approved partially the appeal of the Applicant. The High Court upheld the decision of the Minor Offences Court in Prizren as to the fine but changed the decision as to the period where the Applicant did not have the right to enter to one year. The High Court ruled that it had reviewed the allegations set out in the appeals, the challenged decisions and the statement of the Applicant deposited in the main hearing in the first instance court, in which she admitted to having committed the minor offence, but argued that the decision was premature. The High Court further

reasoned that, based on other facts from the case file, also the factual situation was certainly ascertained as per the ruling of the appealed decision of the Municipal Court. 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. The High Court also informed the Applicant that no appeal was allowed against its decision.

Applicant's allegations

27. The Applicant alleges that the Commission, Appeals Committee, DMF, Minor Offences Court in Prizren and the High Court for Minor Offences assessed wrongfully the factual situation.

28. Further, the Applicant alleges that the Minor Offences Court in Prizren and the High Court for Minor Offences have not reviewed how the Expulsion Order was issued but only concluded that it has not been respected by the Applicant.

Assessment of the admissibility of the Referral

29. The Court notes that the Applicant complains about two issues:

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

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

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

31. 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

32. In order to be able to consider the Applicant's complaint about the administrative proceedings before the Review Commission and the Appeals Committee and her allegations that she has been denied the right to a legal remedy as guaranteed by Article 32 of the Constitution, the Court considers that it is necessary to first examine whether the Applicant has exhausted all legal remedies available to her under applicable law.

33. 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".

34. This means that, as to the administrative proceedings before the Review Commission and the Appeals Committee, the Applicant should show to this Court to that she has exhausted all available remedies, including an appeal to the Administrative Chamber of the Supreme Court.

35. In this respect, the Court notes that the Applicant initiated an administrative conflict procedure with the Supreme Court against the Decision of the Appeals Committee dated 8 August 2011. However, the Supreme Court has not yet rendered a decision in this matter.

36. It follows that the Applicant has 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

37. As to the complaint that the decisions of the Municipal Court of Minor Offence and of the High Court for Minor Offence violated the Applicant's 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 her guilty for not implementing the Expulsion Order, whereas it did not review at all the alleged "arbitrary manner for the issuance of that decision"; and,

b. Article 32 [Right to Legal Remedies] of the Constitution, since the Applicant was, allegedly, denied her 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 request for residence permit being rejected and the issuance of the expulsion 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).

38. 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 Applicant has had a fair trial (see among other authorities, Report of the Eur. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).

39. In the present case, the Applicant merely disputes 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 her case.

40. As a matter of fact, the Applicant did not substantiate a claim on constitutional grounds and did not provide evidence that her rights and freedoms have been violated by that public authority. Therefore, the Constitutional Court cannot conclude 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).

41. Taking into account the above considerations, it follows that the Referral as a whole must be rejected as manifestly ill-founded with respect to the proceedings before the municipal court and in part for failure to exhaust all legal remedies with respect to her pending administrative proceedings.

Assessment of the Request for Interim Measures

42. As to the Applicant's request to the Court for interim measures, the Court refer 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 Applicant has not requested to impose interim measure with the Municipal Minor Offence Court in Prizren and with the High Court of Minor Offences in Pristina; and with the Supreme Court pursuant to Article 22 of the Law No. 03/L-202 on Administrative Conflicts and that the Referral was found inadmissible, the Applicant is not entitled under Rule 54 (1) 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 of the Law, Rule 36 (1.c), Rule 54 (1) and Rule 56 (2) of the Rules of Procedure, on 20 March 2012, by majority

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT the Request for Interim Measures;

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

Robert Carolan

President of the Constitutional Court

Prof. Dr. Enver Hasani