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

Prishtina, 1 June 2017
Ref. No.:RK 1072/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI41/16

Applicant

Bedrije Rama

Constitutional review of Decision CML. No. 5/2015, of the Supreme Court of Kosovo, of 17 December 2015

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

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

Applicant

1. The Referral was submitted by Bedrije Rama, residing in Podujeva (hereinafter: the Applicant), who is represented by Rrahman Rama (husband of the Applicant) from Podujeva.

Challenged decision

2. The challenged decision is Decision CML. No. 5/2015 of the Supreme Court of Kosovo, of 17 December 2015, which was served on the Applicant on 2 February 2016.

Subject matter

3. The subject matter is the constitutional review of the abovementioned Decision, by which the Applicant alleges that her rights guaranteed by Article 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) have been violated.

Legal basis

4. The Referral is based on Article 113.7 paragraphs 1 and 7 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 25 February 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 March 2016, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel, composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.

7. On 2 November 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur, replacing Judge Robert Carolan, who on 9 September 2016resigned from the position of the Judge of the Court.

8. On 7 November 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 23 December 2016, the Court requested the Applicant to submit to the Court decision of the Court of Appeals of Kosovo CA. 4714/12 of 6 August 2012 of 6 August 2012.

10. On 26 December 2016, the Applicant submitted the required documents to the Court.

11. On 23 February 2017, the Court notified the Municipality of Podujeva about the registration of the Referral and sent a copy of the Referral.

12. On 6 March 2017, the Municipality of Podujeva sent to the Court its comments regarding the case.

13. On 2 May 2017, the Review Panel after having considered the report of the Judge Rapporteur, unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts regarding the administrative proceedings

14. On 8 July 2004, the Applicant entered into an agreement with the Municipality of Podujeva, for giving in use the construction land under the social ownership on the "Skënderbeu" street.

15. On 6 October 2005, the Board of Directors of the Municipality of Podujeva rendered a decision (Decision No. 02-1/240-02) ordering: *"to remove all temporary facilities on both sides of the street "28 Nëntori" in Podujeva [...]."*

16. On 9 January 2006, the Applicant filed a claim with the Municipality of Podujeva, requesting to change the location of the kiosk from "Skënderbeu" to "28 Nëntori" street, arguing that it is not possible to perform activity on "Skënderbeu" street because of complaints of some neighbors.

17. On 31 March 2006, the Municipality of Podujeva (Conclusion No. 09-32) rejected the Applicant's request, due to urban obstacles, namely on the grounds that *"the location where the party requests to place the facility is used by the municipal courts and of minor offense court, where the construction of the building for the courts is expected to happen soon."*

18. On 4 April 2006, the Applicant filed a complaint with the Chief Executive of the Municipality Podujeva, against Conclusion No. 09-32, of 31 March 2006, of the Municipality of Podujeva.

19. On 11 May 2006, the Chief Executive of the Municipality of Podujeva (Decision No. 02/09-03-353) rejected the appeal as ungrounded, reasoning that *"the request of the abovementioned has no legal support."*

20. On 29 May 2006, the Applicant filed a complaint with the Ministry of Environment and Spatial Planning, against the said Decision of the Chief Executive of the Municipality of Podujeva, claiming the existence of the *"substantial violations of the provisions of the Law on General Administrative Procedure."*

21. On 14 August 2006, the Ministry of Environment and Spatial Planning (Decision No. 66/06) annulled the Decision of the Chief Executive of the Municipality of Podujeva and remanded the case for reconsideration (to the Chief Executive of the Municipality of Podujeva). The decision reads that *"there is no legal basis for deciding on this administrative matter. In the case file and the reasoning of the decision by the municipal authority of Podujeva, it has not been proved that there is a decision on the General*

Urban Plan for the neighborhood of the city, approved by the Municipal Assembly in Podujeva. In the administrative process in the first instance, when assessing the evidence in the decision-making, the relevant authority does not provide evidence with legal basis."

22. Following the Decision of the Ministry of Environment and Spatial Planning, the Applicant placed the kiosk on "28 Nëntori" street.

23. On an unspecified date, the Applicant filed a complaint with the Chief Executive of the Municipality of Podujeva for the implementation of Decision No. 66/06, of the Ministry of Environment and Spatial Planning.

24. On 4 October 2006, the Applicant filed a claim with the Supreme Court for the implementation of Decision No. 66/06, of the Ministry of Environment and Spatial Planning.

25. On 12 November 2007, the Municipality of Podujeva-Directorate of Inspection (Decision No. 165/05) orders the Applicant to remove the kiosk placed on "28 Nëntori" street in Podujeva, instructing her that she must first apply for a permit from the competent authority.

26. On 13 November 2007, the Chief Executive of Municipality of Podujeva (Decision No. 02.09-52-466-1), deciding in the repeated proceedings, rejected as ungrounded the Applicant's complaint who submitted a request for the implementation of Decision No. 66/06, of the Ministry of Environment and Spatial Planning. In this decision is stated that *"the contract mentioned* [concluded in 2004] *is de jure still in force as the later has not been yet terminated by the Department of Cadastre, Geodesy and Property, but de facto is has been unilaterally terminated by Mrs. Bedrije Rama, who arbitrarily has displaced the kiosk in the immovable property* [...] *which is located on "28 Nëntori" street, the immovable property owned by the Municipality of Podujeva given in use to the Municipal Court [...] From this, this authority finds that the Department of Cadastre, Geodesy and Property, MA Podujeva, has rightly rejected the request of the abovementioned for temporary use of the registered location [...]."*

27. On 14 November 2007, the Municipality of Podujeva- Directorate of Inspection demolished the Applicant's kiosk located on "28 Nëntori" street.

28. On 4 January 2008, the Applicant filed a complaint with the Ministry of Environment and Spatial Planning, against Decision No. 02.09-52-466-1, of the Chief Executive of the Municipality of Podujevo, of 13 November 2007, requesting the Ministry of Environment and Spatial Planning *"to annul the Decision of the Chief Executive of the MA Podujeva as ungrounded and to allow the placement of the temporary kiosk."*

29. On 4 February 2008, the Supreme Court of Kosovo (Decision A. No. 2431/2006) rejected the Applicant's claim (filed on 4 October 2006) as inadmissible. The Decision noted that *"the Supreme Court finds that the conditions to initiate the procedures of the judicial administrative conflict*

based on the silence of the administration have not been met, because the Chief Executive of Municipality of Podujeva acted pursuant to the obligation deriving from the above mentioned decision [...] so that he took the abovementioned decisio , which pursuant to the above mentioned legal provision is not a final administrative act".

30. On 30 April, 2008, the Ministry of Environment and Spatial Planning (Decision No. A-03/08) approved the appeal of the Applicant (filed on 24 January 2008), by annulling Decision 02.09-52-466 -1 of the Chief Executive of the Municipality of Podujeva, of 13 November 2007, and remanding the case for reconsideration to the Chief Executive of the Municipality of Podujeva. The decision, among others, reasoned that *"the decision rendered by the Chief Executive of the Municipality of Podujeva, does not have legal support based on which it was decided on this administrative matter [...] there is no decision for revocation of temporary permits issued by the Municipal Assembly of Podujeva.".*

31. On 30 June 2008, the Applicant filed a claim with the Municipality of Podujeva, requesting the review of its earlier decision, in accordance with Decision No. A-03/08, of the Ministry of Environment and Spatial Planning.

32. On 18 August 2008, the Applicant filed a claim for administrative conflict with the Supreme Court against the Chief Executive of the Municipality of Podujeva, because he did not take a decision of the first instance.

33. On 31 October 2011, the Supreme Court of Kosovo in the administrative conflict (Judgment A. No. 1041/2008) approved the Applicant's claim by ordering the Chief Executive of the Municipality of Podujeva, that within a period of thirty (30) days decides on the Applicant's request for implementation of Decision No. A-03/08, of the Ministry of Environment and Spatial Planning of 30 April 2008. The Judgment, among other things, reasoned that *"the legal requirements provided pursuant to Article 26, paragraph 1 of the Law on Administrative Conflict regarding the submission of the claim due to the failure of the administrative authority to render a decision pursuant to the mandatory decision of the second instance, therefore, the responding authority is obliged to act within the provided time limit pursuant to Decision No. A-03/08 of 30.04.2008 of the Ministry of Environment and Special Planning, while taking into consideration the remarks stated in this Judgment."*

Summary of facts in the enforcement proceeding

34. On 9 December 2011, the Applicant addressed the Municipal Court in Podujeva with a proposal to permit the execution of the Judgment A. No. 1041/2008 of the Supreme Court of 31 October 2011.

35. On 17 October 2012, the Municipal Court in Podujeva (Decision E. No. 1233/11), approved the proposal of the Applicant that within thirty (30) days the Municipality of Podujeva decides on the request for

implementation of Decision of the Ministry of Environment and Spatial Planning (Decision No. A-03/08) and Judgment A. No. 1041/2008 of the Supreme Court of Kosovo.

36. On 30 October 2012, the Municipality of Podujeva filed objection with the Municipal Court in Podujeva against this Decision.

37. On 9 November 2012, the Municipal Court in Podujeva (Decision E. 1233) rejected as unfounded the objection on the grounds that "*none of the reasons to submit the objection have been met, which in turn would hinder the enforcement permitted by the court pursuant to Article 55 of the LEP.*"

38. On 22 November 2012, Municipality of Podujeva filed appeal with the Court of Appeal against the Decision of the Municipal Court in Podujeva, on the grounds of erroneous and incomplete determination of factual situation.

39. On 6 August 2013, the Court of Appeal (Decision CA. No. 4714/12) approved the appeal of the Municipality of Podujeva, quashed the Decision of the Municipal Court in Podujeva and remanded the case for retrial to the Basic Court in Prishtina- Branch in Podujeva.

40. In the decision is stated that "*according to the finding of this court of first instance court has permitted the execution contrary to Article 24 (b) of the Law on the Enforcement Procedure (LEP) [...]. As the first instance court has issued a decision on enforcement and in this case did not assess the adequacy of the proposal it is reasonably shown based on a complaint that the challenged decision was rendewred in violation of the Law on Enforcement Procedure.*"

41. On 17 October, 2014, the Basic Court in Prishtina- Branch in Podujeva rendered Decision CP. No. 450/13, by terminating the enforcement proceedings against the Chief Executive of the Municipality of Podujeva. In the decision is argued that "*The court in compliance with the remarks and suggestions of the Court of Appeal in Prishtina pursuant to Article 66 of the LEP that came into force on 01.01.2012 decided ex officio to terminate the enforcement procedure of the proposer in conjunction with Article 71 of the LEP. Pursuant to Article 24 (b) of the old LEP, Judgment A.no.1041/2008 of 31.10.2011 of the Supreme Court of Kosovo did not constitute an executive title as it was not related to a monetary obligation but only ordered the Chief Executive Officer of Podujeva Municipality to render within a 30 day time limit a decision pertaining to the proposer's request. Thus based on Article 71 paragraph 1.1 of the LEP and the document based on which the enforcement decision or order was rendered does not have an executive title or enforcement characteristics, so the same is not an executive document and the procedure shall be terminated ex officio pursuant to Article 66 items 1 and 3 of the LEP.*"

42. The Applicant filed an appeal with the Court of Appeal of Kosovo against the Decision of the Basic Court in Prishtina- Branch in Podujeva.

43. On 29 April 2015, the Court of Appeal (Decision Ac. No. 4600/14) rejected the appeal as ungrounded, by upholding the Decision of the Basic Court in Prishtina- Branch in Podujeva in entirety.

44. On 27 May 2015, the Applicant submitted a proposal to the State Prosecutor to file a request for protection of legality against Decision CP. No. 450/13 of the Basic Court in Prishtina- Branch in Podujeva, of 17 October 2014 and Decision Ac. no. 4600/14, of the Court of Appeal, of 19 April 2015.

45. The State Prosecutor of the Republic of Kosovo approved the Applicant's request and filed a request for protection of legality.

46. On 17 December 2015, the Supreme Court of Kosovo (Decision CML. No. 5/2015) rejected the request for protection of legality as ungrounded. The Decision of the Supreme Court, *inter alia*, emphasizes: "*the lower instance courts applied correctly the substantive law when they found that the enforcement document pursuant to which the enforcement was permitted does not contain an executive title pursuant to Article 24 (b) of the LEP, and that the procedure should be terminated ex officio pursuant to Article 66 items 1 and 3 of the LEP*". In the Decision, the Supreme Court reasoned that "*the proposal of the proposer-creditor to permit the enforcement based on the final Judgment of the Supreme Court of Kosovo, which is rendered in the administrative procedure does not constitute an executive title pursuant to Article 24 item (b) of the LEP, which was applicable at the time the enforcement proposal was submitted*".

Applicant's allegations

47. The Applicant alleges that Decision CML. No. 5/2015 of the Supreme Court of Kosovo, of 17 December, has violated the rights guaranteed by Article 49 of the Constitution [Right to Work and Exercise Profession].

48. More specifically, the Applicant alleges that: "*[...] my right to work has been violated because my work place was demolished and I no longer have a working place. Whereas, the Municipality does not implement the decisions of the Ministry or the Judgment of the Supreme Court that approved my claim [...] Despite the courts initially rendered positive decisions in my favor, in the end they terminated the procedure, whereas the municipality never implemented the decisions of the courts or the Ministry.*"

49. The Applicant requests the Court the following:

> "*I request the Constitutional Court to render a positive Decision in my favor and oblige the municipality to implement the Ministry's Decision and the Judgments of the Supreme Court that approved my claim for setting up my kiosk and start working because I am in a difficult economic situation [...] we request the implementation of the*

judgments and decisions of the Ministry and to set up the kiosk on the street "28 Nëntori".

Comments submitted by the Municipality of Podujeva

50. In its response to the Court, the Municipality of Podujeva states that it fully supports the Decision of the Supreme Court of Kosovo CML no. 5/2015 of 17 December, by arguing as follows: "*We consider that the Supreme Court of Kosovo has rightly rejected as ungrounded the request for protection of legality of the State Prosecutor of Kosovo filed against the Decision of the Basic Court in Prishtina-Branch in Podujeva CP.nr.450/2013 of 17 October 2014 and Decision of the Court of Appeal of Kosovo Ac.no.4600/2014 dated 29 April 2015*".

Admissibility of the Referral

51. The Court should first examine whether the Applicant fulfilled the admissibility requirements established by the Constitution and as further specified by the Law and the Rules of Procedure.

52. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

> *1. "The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> *[...]*
> *7. 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."*

53. The Court also refers to Article 48 [Accuracy of the Referral] 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.*"

54. The Court takes into account Rule 36 [Admissibility Criteria] (1) (d) and 36 (2) (b) of the Rules of Procedure, which foresees that:

> *"(1) The Court may consider a referral if:*
> *(...)*
> *(d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
> *(...)*
> *(d) the Applicant does not sufficiently substantiate his claim."*

55. In the case at hand, the Court notes that the Applicant is an authorized party, that she has exhausted all available legal remedies, and that she submitted the Referral within the legal deadline.

56. However, the Court, further, needs to assess whether the requirements established in Article 48 of the Law, and provided for in Rule 36 of the Rules of Procedure have been met.

57. The Applicant claims that the challenged decision has violated the rights guaranteed by Article 49 [Right to Work and Exercise Profession] of the Constitution.

58. Regarding the Applicant's claim, the Court refers to Article 49 [Right to Work and Exercise and Profession] which establishes:

> *"1. The right to work is guaranteed.*
> *2. Every person is free to choose his/her profession and occupation".*

59. The Court notes that the Applicant alleges that the violation of the right guaranteed by Article 49 [Right to Work and Exercise Profession] of the Constitution occurred as result of the non-implementation of the decisions rendered in judicial and administrative proceedings, which as she claims, were in her favor.

60. In this regard, the Applicant claims that *"Although the courts have taken positive decisions for me, in the end they have terminated the proceedings, while the Municipality never implemented the decisions of the courts and the Ministry".*

61. Regarding this claim, the Court recalls that in this case there are several different decisions, brought in the administrative procedure and various court instances.

62. The Court notes that the final decision which is explicitly challenged by the Applicant is Decision CML. No. 5/2015 of the Supreme Court, of 17 December 2015, in the enforcement procedure.

63. The Court notes that the abovementioned Decision of the Supreme Court addressed and decided regarding the Applicant's claims, which have already been raised at lower instances and which were mainly related to the termination of the enforcement procedure.

64. In this regard, the Court refers to the Decision of the Supreme Court CML. No. 5/2015 of the Supreme Court, of 17 December 2015, which confirmed that *"the lower instance courts have correctly applied the provisions of the enforcement procedure and the substantive law."*

65. The Court considers that the regular courts have provided answers and detailed explanations of their decisions, as to why the enforcement

procedure was terminated and that the present case lacked the executive title of the executive order.

66. In addition, the Court considers that the Applicant's allegations pertain to the way the regular courts have made relevant qualifications and interpretations of the facts and applicable law in this case.

67. The Court notes that the conclusions and qualifications of the facts and legal interpretations are the prerogative of the regular courts.

68. The Court reiterates that it is not the task of the Constitutional Court to deal with errors of facts or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). In this regard, the constitutional control over the judicial decisions is limited in order to protect the constitutional rights of an individual. Therefore, the Constitutional Court cannot act as "a fourth instance court" in relation to the decisions of the regular courts (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

69. In the present case, the Court considers that the Applicant does not prove that she is a victim of an unfair or an arbitrary act of a public authority, which has resulted in violation of her right protected by Article 49 of the Constitution, namely the right to work and exercise profession.

70. In sum, the Court considers that the Applicant has not substantiated her allegations of a violation of fundamental human rights and freedoms guaranteed by the Constitution, because the facts presented by her do not in any way show that the regular courts denied her the right guaranteed by the Constitution, as alleged by the Applicant.

71. Therefore, the Referral, on constitutional basis is manifestly ill-founded in accordance with Rule 36 (1) (d) and 36 (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution, Article 48 of the Law, and in accordance with Rules 36 (1) (d) and (2) (b) of the Rules of Procedure, on 2 May 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision 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**

Bekim Sejdiu Arta Rama-Hajrizi