



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

Prishtina, 3 July 2017
Ref. No.:RK 1099/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI54/16

Applicant

Ramadan Demirović

Constitutional review of Judgment GSK-KPA-A-002/14 of the Supreme Court of Kosovo Property Agency Appeals Panel of 14 October 2015

THE 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 Ramadan Demirović from Dragash, residing in Belgrade, Republic of Serbia (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment GSK-KPA-A-002/14 of the Supreme Court of Kosovo Property Agency Appeals Panel (hereinafter: the Appeals Panel), of 14 October 2015, which was served on him on 14 December 2015.

Subject matter

3. The subject matter is the constitutional review of the abovementioned Judgment of the Appeals Panel whereby the Applicant's rights and freedoms guaranteed by Article 24 (Equality Before the Law), Article 31 (Right to Fair and Impartial Trial), Article 46 (Protection of Property) of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial), Article 8 (Right to respect for private and family life), Article 1 of Protocol No. 1 (Protection of Property) and Article 14 (Prohibition of discrimination) of the European Convention on Human Rights (hereinafter: ECHR) have allegedly been violated.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 18 March 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 13 April 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.
7. On 22 April 2016, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Appeals Panel.
8. On 9 June 2016, the Court sent to the Applicant a letter requesting to submit additional documents, as well as the receipt indicating when the challenged judgment was served on him.
9. On 17 June 2016, the Applicant submitted additional documents and the receipt on the service of Judgment.
10. On 31 May 2017, the Review Panel considered the report of Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. Until 1999, the Applicant lived in an apartment located in Prishtina, with address, Dardania SU 9/1 L2, VII floor, apartment number 30.

12. In 1999, the Applicant left Prishtina and persons B.D and L.D moved into the aforementioned apartment.
13. On an unspecified date, the Applicant filed a claim to repossession of his property with the Housing and Property Directorate (hereinafter: HPD). This claim was registered under number DS302305.
14. On a different unspecified date, the persons B.D. and L.D., also filed a claim with the HPD, which was registered under number DS000369, requesting the restitution of the property rights over the property. This claim was based on the contract on associated resources No. 01-982, dated 12 May 1986.
15. On 18 June 2004, the Housing and Property Claims Commission (hereinafter: HPCC) rendered Decision [HPCC/D/137/2004/A&C], which approved claim no. DS000369 of the Applicants B.D and L D. and recognized their rights as "A" category clients, because they had acquired rights to the property before 1989, and therefore, they acquired the right to restitution of the immovable property in question.
16. The HPCC registered the Applicant's claim DS302305 as a "C" category claim and by the same decision rejected the claim as ungrounded.
17. The Applicant filed an appeal with the second instance panel of HPCC against Decision [HPCC/D/ 137/2004/A&C], requesting a review of the first instance decision.
18. On 11 December 2006, the second instance panel of HPCC rendered a group decision [HPCC/REC/86/2006], whereby the Applicant's request for review of the first instance decision of the HPCC was rejected as ungrounded.
19. On 16 October 2006, UNMIK Regulation No. 2006/50, entered into force. This regulation established the Kosovo Property Agency (KPA) as the legal successor to HPD.
20. On 17 October 2007, using the legal possibility given to him by the new UNMIK Regulation [2006/50], the Applicant submitted a property claim to the KPA for recognition of ownership rights over the property in question.
21. On 18 April 2013, by Decision [KPCC/D/R/199/2013], the Kosovo Property Claims Commission (hereinafter: KPCC) rejected the property claim of the Applicant as being subject to a *res judicata* decision. The KPCC reasoned that,

"In accordance with Article 11.4 of UNMIK Regulation 2006/50, as well as by adopted Law No. 03/L 079, the Commission will reject the claim in entirety, if the claim was previously considered and decided in a final administrative or a judicial decision, therefore this claim is rejected."
22. On 23 January 2014, the Applicant filed an appeal with the Appeals Panel of the KPA (hereinafter: Appeals Panel) against Decision [KPCC/D/R/199/2013] of the KPCC, stating that: *"it is not about res judicata, because these are two*

different claims, one on which it has already been decided in 2006 and which concerned the claim for repossession of property, and the other claim, which he filed in 2007 regarding the confirmation of the property rights."

23. On 14 October 2015, the Appeals Panel rendered Judgment [GSK-KPA-A-002/14], which rejected the Applicant's appeal, reasoning that,

"The Applicant claims that the subject matter is now of a different nature from the subject matter that was decided in the previous proceeding. He alleges that the KPCC should have decided on his property claim regarding his right of use, while now it is about his property rights. The Court finds that this allegation is erroneous. The HPCC decided on two claims: the property claim of the respondent of "A" category regarding the restitution of his property rights over the property in the claim and the property claim of "C" category appellant regarding the re-possession of the property right (ownership), the legal possession or rights of use, or tenancy rights over the property in the claim.

Accordingly, the issue between the claimant and the appellant as to who is the property owner – who has the ownership - over the property in the claim has already been resolved by the HPCC. Therefore, the decision of KPCC is res judicata on the issue of the property rights over the property in the claim between the appellant and the claimant. Accordingly, already rejected, a property right cannot be a subject of review in the current proceeding."

Applicant's allegations

24. The Applicant alleges that, *"By the actions of the Appeals Panel of the Supreme Court and by previous decisions of HPCC and KPCC my rights guaranteed by the Constitution of Kosovo and the European Convention on Human Rights and Freedoms have been violated. The concerned apartment was my home in which I used to live with the members of my family and now my right to home was taken and the apartment was given to another person."*
25. The Applicant further alleges in the Referral: *"Since I am a member of a national minority in Kosovo, this clearly leads to the conclusion that the representatives of majority population do not face similar problems that I face, and it is obvious that there is no equality before the law and that on this basis I am discriminated against."*
26. The Applicant requests that the Court, based on the held violations of the rights guaranteed by the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms, orders the authorities in Kosovo to promptly rectify the alleged violations of the Constitution.

Admissibility of Referral

27. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and Rules of Procedure.

28. In this respect, the Court initially refers to Article 113. 7 of the Constitution, which establishes:

[...]

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."

29. The Court refers to Article 48 of the Law, which provides:

"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."

30. Regarding the foregoing, the Court finds that the Applicant submitted the Referral as an individual and in a capacity of an authorized party; that he pointed out at possible constitutional violations; the Referral was submitted in accordance with the deadlines established in Article 49 of the Law and after exhausting all legal remedies.

31. However, the Court must also take in to consideration Rules 36 (1) (d) and 36 (2) (b) and (3) (g) of the Rules of Procedure, which foresee:

"(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:

[...]

(b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights"

(3) A Referral may also be deemed inadmissible in any of the following cases:

[...]

g) the Referral is incompatible ratione temporis with the Constitution."

32. In this case, the Court by examining the case file and the Applicant's allegations found that the Applicant had two proceedings before the regular courts and that both proceedings were decided by final decisions.
33. The Court observes that, basically, the Applicant raises constitutional allegations with regards to both sets of proceedings. He alleges that "*the actions of the Appeals Panel of the Supreme Court and previous decisions of HPCC and KPCC*" encroached on his rights guaranteed by the Constitution and the ECHR.
34. The Court notes that the Applicant initiated the first proceeding by claim DS302305 submitted to HPD, in which he requested to be allowed repossession of the property in question.
35. The Court also notes that the first proceeding was concluded on 11 December 2006, by final decision [HPCC/REC/86/2006] of the second instance panel of the HPCC whereby the subject matter of this claim was resolved.
36. Therefore, the Court concludes that the proceedings and the decisions related to the first proceeding were rendered under different circumstances and at a time when the Court had no temporal jurisdiction and as such are *ratione temporis* incompatible with the Constitution which entered into force on 15 June 2008 (see, for example case: no. KI47/14, Applicant: *Mustaf Zejnullahu*, Resolution on Inadmissibility of 11 August 2014, paragraph 25).
37. Therefore, pursuant to Rule 36 (3) (g) of the Rules of Procedure, the claim regarding the first group of the proceedings is to be rejected as incompatible *ratione temporis* in accordance with the Constitution.
38. As regards the second proceeding, the Court notes that it relates to the claim which the Applicant submitted on 17 October 2007 to the KPA, in which he requested the recognition of ownership rights over the property. The KPCC decided in first instance on this claim on 18 April 2013, and the Appeals Panel decided in final instance of this claim on 14 October 2015.
39. In this regard, the Court notes that the Applicant considers that, when deciding on his second claim, the regular courts violated his rights and freedoms guaranteed by Article 24 (Equality Before the Law), Article 31 (Right to Fair and Impartial Trial) Article 46 (Protection of Property) of the Constitution and Article 6 (Right to a fair trial), Article 8 (Right to respect for private and family life) of Article 1 of Protocol No. 1 (Protection of property) and Article 14 (Prohibition of Discrimination) of the ECHR.
 - i) **Alleged violation of Article 31 (Right to Fair and Impartial Trial) of the Constitution and Article 6 (Right to a fair trial) of the ECHR**
40. As to the Applicant's allegation regarding a violation of Article 31 in conjunction with Article 6 of the ECHR, the Court first of all recalls that the fairness of a proceeding is assessed looking at the proceeding as a whole (see case: ECHR, *Barbera, Messeque and Jabardo v. Spain*, Judgment of 6

December 1988, Application no. 10590/83, paragraph 68). Therefore, in the determination of the merits of the Applicant's allegations, the Court will comply with this principle.

41. In this regard, the Court noted that the Applicant considers that his right guaranteed by Article 31 of the Constitution has been violated because in the contested proceedings before the KPCC, and later in the appeal proceedings before the Appeals Panel, he failed to win his claim to his property rights, because the courts appreciated more and gave more importance to the allegations of the respondent.
42. The Court reiterates that the complete determination of the factual situation is within the jurisdiction of regular courts, and that the role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance court". (See ECtHR case *Akdivar v. Turkey*, No. 21893/93, 16 September 1996, para. 65; see also, *mutatis mutandis* Constitutional Court case KI86/11, Applicant *Milaim Berisha*, 5 April 2012).
43. The Court further notes that the purpose of Article 31 of the Constitution and Article 6 of the ECHR, *inter alia*, is to assign duties to the courts to perform the prescribed verification of submissions, arguments and evidence submitted by the parties to the proceedings, without prejudice of their assessment and relevance in respect of the court decision (see case: ECHR *Kraskav. Switzerland*, Judgment of 19 April 1993, Application No. 13942/88).
44. Article 6.1 ECHR also requires that a fair balance is established between the parties to the proceedings, namely that there exists an equality between the parties to the proceedings (see Case ECtHR *De Haes v. Gijssels v. Belgium*, Judgment of 24 February 1997, Application No. 19983/92).
45. Accordingly, the Court notes that the regular courts took into account all allegations of both parties to the proceedings, the Applicant as a claimant and the respondent, when determining the ownership right over the immovable property in question, and placed them in an equal position, enabling them to present their arguments and evidence.
46. The Court further notes that the Appeals Panel specifically addressed the Applicant's allegation that the subject matter in this second claim is of a different nature from the one decided in the first proceedings, and therefore, the case is not *res judicata*.
47. In this regard, the Court notes that the Appeals Panel took into account the grounds of the Applicant's appeal, which addressed the question of the *res judicata* decision, and the Appeals Panel concluded that the respondent party had been found to be a claimant of the "A" category, because he had ownership rights over the property in question. As regards the Applicant's claim, the Appeals Panel determined that he was a claimant of the "C" category, because he in fact never had a right over the property in question.

48. Therefore, the Court notes that the Appeals Panel examined all allegations which the Applicant raised during the regular proceedings, whereby it provided clear conclusions as to why those allegations were ungrounded.
49. Accordingly, the Court considers that the Applicant's allegations regarding the violation of Article 31 of the Constitution and Article 6 of ECHR are ungrounded.

ii) Alleged violation of Article 8 (Right to respect for private and family life) of the ECHR

50. As to the Applicant's allegations regarding a violation of Article 8 of the ECHR related to the "*right to home*", the Court notes that according to the case law of the ECtHR, the term "home" has an autonomous meaning and assumes, in principle, that the person has developed a domicile relationship to the place of living. Only in such a determined situation, a particular apartment can be considered a home and a particular person may enjoy the protection of the rights of access and housing (see case: ECtHR decision *Wiggins v. United Kingdom*, application no. 7456/76, no. 40, 1978).
51. The Court notes that Article 8 ECHR protects an individual's right to respect for his home and provides for non-interference of public authorities with the exercise of this right, except in cases defined in paragraph 2 of this Article.
52. However, the Court notes that in this case the Applicant does not allege any interference with his home by public authorities, but considers that only he has the right to access the property of which he considers himself the owner. According to the decisions of the regular courts, the Applicant never had a right of ownership over the apartment. Thus, the subject of his appeal is the right to acquire ownership of the concerned apartment and not interference with the Applicant's already acquired right.
53. In this regard, the Court considers that the Applicant's allegations of a violation of Article 8 of the ECHR are ungrounded.

iii) Alleged violation of Article 46 (Protection of Property) and Article 1 of Protocol No. 1 (Protection of property) of the ECHR

54. The Applicant considers that the courts have also violated the rights guaranteed by Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR.
55. In this respect, the Court notes that the right which the Applicant claims to have acquired, could be considered as the right to property if there is a legal basis, namely, if he acquired the apartment in question in accordance with the legal rules through legal inheritance or legal action.
56. However, the Court notes that the courts in their decisions found that the Applicant could not be the holder of the ownership rights over the property in question, because the ownership rights were held by another person prior to the Applicant occupying the apartment. As such, the Applicant could not

acquire this ownership under the laws prevalent during the period of his occupancy.

57. Accordingly, the Court notes that the Applicant had not acquired property within the meaning of Article 1 of Protocol 1 of the ECHR, since the right to property does not exist until the moment when the person's right over a property in question is determined. In other words, the right to property does not include the right to acquire the property (see case: ECHR *Marckx v. Belgium* Judgment of 13 June 1979 Application No. 6833/74).

iv) Alleged violation of Article 24 (Equality Before the Law) of the Constitution and Article 14 (Prohibition of discrimination) of the ECHR

58. The Applicant considers that, as a member of a minority community in Kosovo, he was discriminated against during the entire proceedings, which is contrary to Article 24 of the Constitution and Article 14 of the ECHR.
59. In this regard, the Court recalls that a treatment is discriminatory if an individual is treated differently to others in similar positions or situations, and if that difference in treatment has no objective and reasonable justification. In order that it is justified, the treatment must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized (see case: ECHR Judgment, *Marckx v. Belgium*, of 13 June 1979 Application No. 6833/74).
60. Therefore, it is necessary in each specific case to determine whether the Applicant was treated differently from others in the same or similar situations. Any different treatment shall be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim and if there is no reasonable relationship between the means employed towards that aim.
61. In the present case, the Court notes that, aside from his blanket allegation of a violation of the abovementioned right, the Applicant did not provide any argument which would indicate that in the proceedings of the case he was in any way discriminated against.
62. Therefore, the Court considers that the Applicant's allegation of a violation of the prohibition of discrimination under Article 24 of the Constitution and Article 14 of the ECHR regarding the right to a fair trial are ungrounded.
63. Based on the foregoing, Court considers the Applicant's Referral is an expression of dissatisfaction by the fact that his claim requesting the exercise of his property rights was rejected as ungrounded in all instances, which, in the present case, is not, either directly or indirectly, a result of a lack of a fair trial.
64. Therefore, the Court finds that the Applicant does not provide facts and evidence that could justify other allegations of violation of the rights referred to, because of which there are no elements that indicate *prima facie* that the assessment of the merits would be required.

65. In this respect, the Court notes that the Referral is manifestly ill-founded if it lacks any *prima facie* evidence which would clearly point out to a possible violation of human rights and freedoms (see case: ECHR, *Vanek vs. Slovak Republic*, Decision of 31 May 2005, application no. 53363/99), if the facts in respect of which the Referral is submitted clearly do not constitute a violation of the rights alleged by the Applicant, namely if the Applicant has no “reasoned Referral” (see case: ECtHR, *Mezőtúr-Tiszazugi and Vízgazdálkodási Társulat v. Hungary*, Judgment of 26 July 2005, the application number 5503/02).
66. In sum, the Court considers that in the conducted proceedings there are no facts or circumstances that would in any way indicate that in the proceedings before the regular courts, the Applicant’s human rights or freedoms guaranteed by the Constitution or the ECHR have been violated.
67. The Court considers that the Applicant has not substantiated his allegations, nor has he submitted any *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (See, case No. KI19/14 and KI21/14 Applicants *Tafil Qorri and Mehdi Sylá*, Constitutional Court of the Republic of Kosovo, Constitutional Review of Decision CA. no. 2129/2013, of the Court of Appeal of Kosovo, of 5 December 2013, and Decision CA. no. 1947/2013, of the Court of Appeal of Kosovo, of 5 December 2013).
68. Therefore, the referral as regards the complaints relating to the first set of proceedings, are incompatible *ratione temporis* with the jurisdiction of the Court, in accordance with Rule 36 (3) (g) of the Rules.
69. Regarding the complaints relating to the second set of proceedings, the Referral is manifestly ill-founded, and is to be declared inadmissible in accordance with Rule 36 (1) (d) and (2) (b) of the Rules.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 47 of the Law and Rule 36 (1) (d), 2 (b) and (3) (g) of the Rules of Procedure, in its session held on 31 May 2017, unanimously

DECIDES

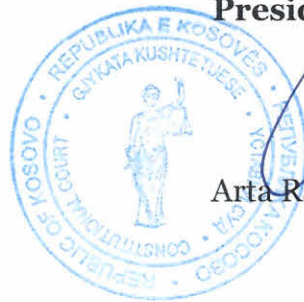
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur



Bekim Sejdiu

President of the Constitutional Court



Arta Rama-Hajrizi