



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, 26 May 2014
Ref. No.:RK635/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI05/13

Applicant

Florim Gashi

**Constitutional Review of the Judgment, A. no. 811/2006 of the Supreme
Court of Kosovo dated 14 March 2007**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

The Applicant

1. The Applicant is Mr. Florim Gashi (hereinafter: the Applicant), residing in Klina, who is represented by Mr. Skënder Gashi.

Challenged decisions

2. The Applicant challenges the non-enforcement of the Judgment, A. no. 811/2006 of the Supreme Court of Kosovo dated 14 March 2007 by the Municipality of Klina, which was served on the Applicant on an unspecified date.

Subject matter

3. The subject matter of the Referral is the constitutional review of the Judgment, A. no. 811/2006 of the Supreme Court of Kosovo dated 14 March 2007, whereby the Supreme Court in the administrative procedure, rejected the appeal of the Municipality of Klina. The administrative procedure concerns the Decision of the municipal authorities of Klina on demolition of a construction used by the Applicant for business purposes.
4. In his Referral, the Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) [...]”to *oblige the Municipality of Klina to implement the Judgment of the Supreme.*”

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 the Constitutional Court (hereinafter: the Law), and Rule 56 of the Rules of Procedure (hereinafter: the Rules).

Proceedings before the Court

6. On 16 January 2013 the Applicant filed the Referral with the Court.
7. On 30 January 2013, by Decision GJR. KI05/13, the President appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date, by Decision KSH. KI05/13, the President appointed the Review Panel composed of Judges Altay Suroy (presiding), Snezhana Botusharova (member) and Arta Rama-Hajrizi (member).
8. On 28 February 2013 the Court informed the Applicant of the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 7 May 2014 the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of facts

10. On 14 March 2005, on the basis of a revised urban plan, the Board of Directors of the Municipality of Klina issued a Decision (1/3 NR. 353-247/2005) revoking all existing permits for the construction of temporary premises in the Municipality. The Board of Directors justified this Decision on the basis that all

existing temporary constructions had been constructed on property owned by the Municipality, which the Municipality needed for public purposes.

11. This Decision of the Board of Directors of 14 March 2005 affected also the Applicant, who was using the construction for his business activities.
12. Consequently, on 17 August 2005, the Directorate for Urbanism and Public Services of the Municipality of Klina issued an Order No. 07. No. 354-122/2005 (hereinafter: the Order of the Directorate), obliging the Applicant to demolish the construction.
13. The Applicant was given 15 days to demolish the construction, or the Directorate would proceed to forced execution of its order.
14. Following the above, on 2 September 2005, against the order of the Municipality of Klina, the Applicant submitted a complaint to the Chief Executive Officer of the Municipality of Klina.
15. On 15 September 2005, the Chief Executive Officer of Klina, by Decision 07 No. 354-122/2005 (hereinafter: the Decision of the Chief Executive Officer) rejected as unfounded the complaint of the Applicant and upheld the Order of the Directorate.
16. In the Applicant's case, on 14 October 2005, the Directorate proceeded with the demolition of the construction.
17. On 31 October 2005, against the Decision of the Chief Executive Officer, the Applicant filed an appeal with the Ministry of Environment and Spatial Planning (hereinafter: MESP).
18. On 20 March 2006, the MESP, by its Decision A-106/05 approved the appeal filed by the Applicant, whereby it annulled the Decision of the Chief Executive Officer and remanded the case for review.
19. MESP reasoned that the Chief Executive Officer in Klina in its Decision, had failed to determine the factual situation in a complete and correct manner, and had failed to pay due attention to the relevant legal provisions on administrative procedure, which had rendered the decisions unfair. Consequently, the MESP decided:

“Pursuant to article 242, paragraph 2 of the Law on General Administrative Procedures, the Ministry of Environment and Spatial Planning [...] to remand the case for review. The first instance authority is obliged to act in conformity with decisions of the msecond instance within not later than 30 days from the day this Decision is rendered, and to issue a new Decision by administering the above mentioned evidence.”
20. Consequently, the Municipality of Klina submitted an appeal against the decision of the MESP to the Supreme Court. The Municipality of Klina claimed in its appeal that the MESP decision was not in compliance with the law, and that the law had been applied to the detriment of the Municipality of Klina.

21. On 14 March 2007, the Supreme Court rejected the appeal of the Municipality of Klina.

22. In its Judgment, the Supreme Court held that:

“The contested decision approved the request of Florim Gashi from Klina and annulled the Decision of the Chief Executive Officers of the Municipality of Klina 07.nr.354-122/2005 of date 15.09.2005 and the case was remanded for review.

[...]

The Court concluded that there are contradictions in this legal-administrative matter, which have not been avoided when decided by the first instance body [the Inspectorate of the Directorate for Urbanism], since there were not taken into consideration the evidence in the case file and were not provided reasons about decisive facts, important for fair decision of this legal matter and particularly the determination of the fact whether the urban plan for the town of Klina was approved, whether the decision for revocation of temporary permits was made, whether in the particular case we are dealing with removal of the temporary premises or the forced demolition of the premises, which appears in the phase of forced execution, which should not be the situation in this case, but also due to the fact that whether the deadline of the permit, according to which the construction of the temporary premises took place, has expired.

[...] For these reasons and aiming at avoiding highlighted flaws in the challenged ruling, the sued administrative body [i.e. MESP] annulled the challenged decisions and gave instructions that in the reopened procedure are eliminated shortcomings, with the purpose of rendering a fair and legal decision.”

23. Following the Judgment of the Supreme Court, the Municipality of Klina did not take any action in relation to the Applicant.

24. Based on the submissions, the Applicant addressed the MESP (letter of 17 April 2008) and the Municipal Assembly of Klina (letter of 21 April 2009) regarding the enforcement of the Judgment of the Supreme Court.

25. On 23 January 2013, the Municipality of Klina had filed a Referral with the Constitutional Court, requesting the constitutional review and annulment of the abovementioned Judgment, A. no. 811/2006 of the Supreme Court and 15 other Judgments of the Supreme Court. The Municipality of Klina further requested the annulment of the Decision of the MESP in all 16 cases. The Municipality of Klina filed its Referral based on Article 113, paragraph 4 of the Constitution (See Case KO08/13, Constitutional Court, Resolution on Inadmissibility of 29 November 2013)

26. On 7 May 2014, the Court, upon deliberation, unanimously decided to declare the Referral inadmissible, because the Municipality of Klina was not an authorized party.

Applicant's Allegation

27. The Applicant argues that [...] *"with these arbitrary decisions, Municipality of Klina made grave violations of constitutional provisions, without enabling him [the Applicant] the most basic means for his existence and his 6 family members. Klina municipality by acting in this way violated the constitutional provisions on human rights and freedom pursuant to Article 113.7 of Constitution, Article 47 of Law on Constitutional Court."*
28. The Applicant further alleges that he addressed the Municipality of Klina orally and in written on the enforcement of the Judgment.
29. In his Referral, the Applicant addresses the Court as following:

"It is relevant to mention that all legal regular procedures have been precisely followed by the [the Applicant] up to the Supreme Court of Kosovo, and after all legal remedies are exhausted, we are obliged to address to Constitutional Court of the Republic of Kosovo for legal and constitutional review of the judgment of Supreme Court of Kosovo A. no. 811/2006 dated 14.03.2007."

30. The Applicant concludes, requesting the Court:

"Through our request, we request from Constitutional Court to force Klina municipality on implementation of Judgment of Supreme Court of Kosovo based on Article 116.1 according to which it is said, that decisions of Constitutional Court are obligatory for all persons and institutions of the Republic of Kosovo, and Article 124.6 to oblige the Municipality to implement the judgment of the [Supreme Court] of Republic of Kosovo A. no. 811/2006, as well as the Decision of the Ministry of Environment and Spatial Planning in Prishtina No. A-106/2005 dated 20.03./2006, which became final based on Judgment of Supreme Court of Kosovo."

Admissibility of the Referral

31. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to examine whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.
32. In this respect, the Court refers to Article 113, paragraph 7 of the Constitution, which establishes that:

"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."

33. The Court also refers to Article 47.2 of the Law, which provides:

“The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law”.

34. As said above, the Applicant in his Referral challenges the non-enforcement of the Judgment of the Supreme Court of Kosovo (A. no. 811/2006 dated 14 March 2007) by the Municipality of Klina and requests the Court [...] *“to oblige the Municipality of Klina to implement the Judgment of the Supreme.”*

35. The Court notes that the Supreme Court in the administrative procedure rejected the appeal of the Municipality of Klina filed against the Decision of the MESP as ungrounded. According to the Decision of the MESP, the MESP decided to remand the case for review, and further obliged the first instance body, namely the Municipality of Klina, within 30 days upon receipt of the Decision to render a new Decision based on the recommendation of the MESP. Hence, following the Judgment of the Supreme Court, the Municipality of Klina was obliged to render a new Decision in relation to the Applicant. To this date, the Municipality of Klina has not rendered such a decision.

36. Given that the procedure followed has been the administrative procedure, the Court deems it relevant and necessary to refer to the provisions of the Law on Administrative Conflict.

37. Article 29 of the Law on Administrative Conflicts No. 03/L-202 establishes:

1. If the court of appeals has not issued the decision within thirty (30) days or a shorter time-line determined with special provisions concerning the appeal of the party against the decision of the first instance court, whereas if it does not issue the decision further within seven (7) days with a repetitious request, the party may start the administrative conflict as if the complain has been refused.

2. As it is foreseen under paragraph 1 of this Article, the party may act also when according to his/her request, the decision by the court of first instance has not been issued, against which act the appeal cannot be made.

3. If the court of first instance, against which act the appeal can be made, has not issued any decision based on the request within sixty (60) days or a shorter foreseen time-line with special provisions, the party has the right to address by the request to the court of appeals. Against the decision of court of appeals, the party may start an administrative conflict, but also may, under the conditions in paragraph 1 of this Article, start it even if this body has not issued a decision.

38. In this regard, the Court notes that the Applicant addressed the MESP (letter of 17 April 2008) and the Municipal Assembly of Klina (letter of 21 April 2009), only requesting the enforcement of the Judgment of the Supreme Court.

39. Based on the foregoing, the Court holds that the Applicant, upon expiry of the deadline as provided by the aforementioned provision of the Law on

Administrative Conflicts should have further proceeded with the administrative conflict and thus exhaust the legal remedies provided by law.

40. In this relation, the Court recalls that in accordance with the principle of subsidiarity, the Applicant is under the obligation to exhaust all legal remedies provided by law, as stipulated by Article 113, paragraph 7 and the other legal provisions, as mentioned above. Therefore, the Applicant should have filed an appeal with the second instance body since the first instance body, the Municipality of Klina, had failed to render a Decision within the foreseen deadline.
41. The Court wishes to emphasize that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo will provide an effective remedy for the violation of the constitutional rights (See case *Selmouni v. France*, No. 25803/94, ECHR, Decision of 28 July 1999; and case KI06/10, Applicant *Valon Bislimi*, Constitutional Court, Judgment of 30 October 2010).
42. Thus, the Applicant actually failing to proceed further with the administrative conflict, by filing an appeal with the second instance body within the foreseen deadline is liable to have his case declared inadmissible, as it shall be understood as a waiver of the right to further proceedings on objecting the violation of constitutional rights (See case KI16/12, Applicant *Gazmend Tahiraj*, Constitutional Court, Resolution on Inadmissibility of 22 May 2012).
43. In sum, the Applicant has not exhausted all the legal remedies available to him under applicable law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 47, paragraph 2 of the Law and Rule 36 (1) a) of the Rules of Procedure, on 7 May 2014, unanimously:

DECIDES

- I. TO DECLARE the Referral as 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

President of the Constitutional Court

Ivan Čukalović



Prof. Dr. Enver Hasani