



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

Pristina, 19 September 2013
Ref.no.:RK474/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI23/10

Applicant

Jovica Gadžić

**Constitutional Review of the decision No.04/4-351-114 of the
Municipality of Prizren dated 23 March 2001**

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
Arta Rama-Hajrizi, Judge

The Applicant

1. The Applicant is Jovica Gadžić from Prizren, residing in Niš, Serbia. In the proceedings before the Constitutional Court, the applicant is represented by Mr. Orhan Rekathati, a lawyer from Prizren.

Subject matter

2. The Applicant claims violation of Articles 7, 24 and 46 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).
3. The Applicant claims that the above mentioned decision of the Municipality of Prizren and also the decisions of the Municipal and District Court of Prizren have violated his right to enjoy his personal property, also claiming that he has been discriminated due to his ethnicity.
4. In the proceedings before the regular courts and administrative bodies, there were three parties' namely, the Applicant, Municipality of Prizren and Mr. RM claiming ownership of parcel no. 7204 located in Northern Lakuriq, Prizren.

Legal basis

5. Article 113.7 of the Constitution, Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo dated 15 January 2009 (hereinafter referred to as: the "Law") and Rule 56(2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the "Rules of Procedure").

Proceedings before the Court

6. On 14 April 2010, the Applicant submitted his Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 14 September 2010, the President, by Decision No. GJR. 23/10, appointed Judge Iliriana Islami as the Judge Rapporteur. On the same date, the President, by Decision Nr. KSH 23/10, appointed the Review Panel composed of Judges: Ivan Čukalović, Snezhana Botusharova and Enver Hasani.
8. On 2 July 2012, the President by Decision (No. GJR.KI-23/10) appointed Judge Ivan Čukalović as Judge Rapporteur after the term of office of Judge Iliriana Islami as Judge of the Court had ended. On 26 November 2012, the President, by Decision (No.KSH.KI-23/10), appointed the new Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Enver Hasani.
9. On 14 June 2012, the Court informed the Municipal and District Court in Prizren and the Kosovo Property Agency (hereinafter: the KPA) regarding the applicant's referral.
10. On 18 June 2012, the KPA submitted their response together with supporting documentation.

11. On 19 June 2012, the District Court in Prizren submitted a copy of the most recent decision, dated 8 September 2011 of the Municipal Court in Prizren and later informed the Constitutional Court that this decision has been appealed by both parties and as of 23 February 2012 is under review before the District Court in Prizren.

Summary of the facts

12. On 30 March 1993, the Municipality of Prizren by decision Nr. 04/3-463-186 allocated a parcel to the Applicant in "Northern Lakuriq".
13. On 29 June 1993, the Department of Urbanism and Municipal affairs of the Municipality of Prizren through decision No. 04/4-351-114, approved the Applicant's request and allowed him to construct the residential building in the cadastral parcel No 76204.
14. On 27 April 2001, the Directorate for Urbanism and Planning by decision 04/4-351-89, declared null and void decision nr. 04/4-351-89 dated 23 March 2001 regarding the extension of the construction license of the Applicant.
15. During the year 1999, the Applicant claims that a third party RM has occupied the parcel allocated to him *"who had already build the first floor but due to the war could not continue the constructions on the site."*

Summary of the proceedings before the HPCC

16. On 5 September 2002, the Applicant submitted a claim for immovable property to the HPCC.
17. The Housing and Property Claims Commission through decision HPCC/D/99/2003 dated 12 December 2003, decided in favour of Mr. Jovica Gadžić and ordered the recovery of the possession of the claimed property.
18. The Municipal Court in Prizren through Resolution C.nr.420/2005 dated 24 April 2005 imposed an interim measure ordering RM to discontinue the constructions on the parcel until the completion of the procedure before the courts.
19. On 19 May 2005, the Applicant filed a law suit with the Municipality of Prizren against RM for obstruction of possession.
20. The Municipal Court of Prizren through decision C.nr.420/05 dated 29 June 2005 rejected as out time the Applicant's claim leaving in force the Interim Measure dated 24 April 2005, imposed by this court.
21. The Municipality of Prizren through decision Nr.03/3-463-186/2 dated 18 November 2005 rejected the Applicant's complaint as ungrounded and upheld the decision of the Directorate for Property-Legal Matters of the Municipality.
22. On 10 July 2006, RM submitted his complaint against the decision of the Housing and Property Claims Commission.

23. On 17 January 2007, The Housing and Property Claims Commission by decision HPCC/REC/91/2007, rejected the request for reconsideration submitted by RM.
24. On 31 March 2009, the KPA at the request of the applicant to execute the decision of the Housing and Property Claims Commission, after visiting the parcel notified the applicant that the execution of the decision is not possible due to the fact that the parcel has been modified and thus advised him to direct his request to the legal authorities.

The Municipality of Prizren and RM

25. On 19 February 2008, the Municipal Court in Prizren by decision C.nr. 805/07 approved the RM's claim suit against the Municipality of Prizren and recognized RM as the owner of the parcel.
26. On 7 July 2008, the District Court in Prizren by decision Ac.nr. 224/2008 rejected the appeal submitted by the Municipality of Prizren and upheld the decision of the Municipal Court in Prizren.
27. On 13 August 2008, the Municipality of Prizren submitted the request for revision before the Supreme Court.
28. On 19 September 2008, the Municipal Court in Prizren by decision C.nr. 805/07, rejected the request for revision submitted by the Municipality of Prizren as being inadmissible as the value of the subject of dispute is less than the limit set forth in UNMIK Regulation No. 2000/10.
29. On 28 October 2008 the Municipality of Prizren submitted an appeal to the District Court in Prizren against decision of the Municipal Court in Prizren rejecting their request for revision.
30. On 13 November 2008 the Public Prosecutor at that time (now: State Prosecutor) submitted the request for Protection of Legality seeking the annulment of the Judgment of the District Court in Prizren Ac.br. 224/08 of 7 July 2008 and the Judgment of the Municipal Court in Prizren C.br. 805/07 of 19 February 2008 which recognized RM as the owner of the parcel in dispute and due to essential violations of Article 40 of the Law on Contested Procedure.
31. On 8 July 2009, the Supreme Court of the Republic of Kosovo by decision Mls.nr. 16/2009 rejected the request for the Protection of Legality submitted by the Public Prosecutor as out of time.
32. On 13 October 2009, the District Court in Prizren by decision Ac.Nr. 392/2009 rejected the appeal of the Municipality of Prizren as ungrounded and held that the Municipal Court in Prizren had correctly established the factual situation when it decided upon revision (paragraph 29 of this report).
33. On 13 October 2010, the District Court in Prizren through decision Ac.nr. 392/2009 rejected the appeal submitted by the Municipality of Prizren against

decision Ac.nr. 224/2008 of the District Court in Prizren dated 7 July 2008 and upheld decision C.nr.805/07 of the Municipal Court in Prizren (this decision recognized R.M as the owner of the parcel).

The applicant and RM

34. On 19 January 2007, the Housing and Property Claims Commission rejected the Reconsideration Request submitted by the third party RM against the Housing and Property Claims Commission decision of 12 December 2003, by which the Applicant was given the possession of the parcel.
35. On 8 September 2011, the Municipal Court in Prizren by decision C.nr.400/10 , approved the applicant's claim and held that RM from Prizren has obstructed the applicant from the enjoyment of the parcel by starting construction for his own benefit on the already existing foundation. However, the same decision rejected the applicants request to return the parcel to its previous condition by removing the building which has been build.
36. The applicant and RM have both submitted an appeal against the above mentioned decision of the Municipal Court in Prizren.
37. The Constitutional Court has been notified by the District Court in Prizren that the case Ac. 74/12, is still underway before the District Court in Prizren and is yet to be completed.

Applicant's allegations

38. The Applicant alleges a violation of Article 46 [Protection of Property], in addition to Articles 7 [Values] and 24 [Equality Before the Law] of the Constitution.
39. The Applicant also claims that there has been an excessive length of proceedings since the District Court in Prizren has not reached a decision for 2 years.
40. Furthermore, the Applicant requests from the Constitutional Court to order the restoration of the parcel.

Applicable law

41. The provisions referred to by the HPCC in its decisions are defined in the following legal instruments:

UNMIK Regulation No. 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission:

Housing and Property Directorate

[...]

Section 1.2: *“As an exception to the jurisdiction of the local courts, the Directorate shall receive and register the following categories of claims concerning residential property including associated property:*

Claims by natural persons whose ownership, possession or occupancy rights to residential real property have been revoked subsequent to 23 March 1989 on the basis of legislation which is discriminatory in its application or intent;

Claims by natural persons who entered into transactions of residential real property on the basis of the free will of the parties subsequent to 23 March 1989;

Claims by natural persons who were the owners, possessors or occupancy right holders of residential real property prior to 24 March 1999 and who do not now enjoy possession of the property, and where the property has not voluntarily been transferred.”

The Directorate shall refer these claims to the Housing and Property Claims Commission for resolution or, if appropriate, seek to mediate such disputes and, if not successful, refer them to the HPCC for resolution. [...].”

Section 2:

Housing and Property Claims Commission

2.1. *The Housing and Property Claims Commission (the “Commission”) is an independent organ of the Directorate which shall settle private non-commercial disputes concerning residential property referred to it by the Directorate until the Special Representative of the Secretary-General determines that local courts are able to carry out the functions entrusted to the Commission. [...]*

2.7. *Final decisions of the Commission are binding and enforceable, and are not subject to review by any other judicial or administrative authority in Kosovo.”*

UNMIK Regulation No. 2000/60 of 31 October 2000

[...]

Section 2.4: *“Any person who acquired the ownership of a property through an informal transaction based on the free will of the parties between 23 March 1989 and 13 October 1999 is entitled to an order from the Directorate or Commission for the registration of his/her ownership in the appropriate public record. Such an order does not affect any obligation to pay tax or charge in connection with the property or the property transaction.”*

Section 2.5: “Any refugee or displaced person with a right to property has a right to return to the property, or to dispose of it in accordance with the law, subject to the present regulation.”

Section 2.6: “Any person with a property right on 24 March 1999, who has lost possession of that property and has not voluntarily disposed of the property right, is entitled to an order from the Commission for repossession of the property. The Commission shall not receive claims for compensation for damage to or destruction of property.”

Assessment of the admissibility of the Referral

42. In order to be able to adjudicate the Applicant’s Referral, the Constitutional 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.

43. In this respect, 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”;

44. The Court also refers to Article 47.2 of the Law, which stipulates:

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

45. In the Court’s view, the Housing and Property Claims Commission decision of 19 January 2007 must be considered as the final decision, which became *res judicata*, when it was certified by the Housing and Property Claims Commission Registrar, as was confirmed by the Housing and Property Claims Commission Letter of Confirmation to the Applicant, dated 7 May 2008. This letter also stated that the procedures in connection with the Applicant’s application had been submitted to the Directorate of Housing and Property Directorate in accordance with Section 1.2 of UNMIK Regulation 1999/23, and had been completed, while the remedies that were available to the parties in accordance with the provisions of UNMIK Regulation 2000/60 had been exhausted.

46. In this respect the applicants request to execute the decision of the Housing and Property Claims Commission, the court notes that on March 2009, the KPA states “that the execution of the decision is not possible due to the fact that the parcel has been modified and thus advised him to direct his request to the legal authorities”.

47. In this respect, the Court notes that, the Applicant’s submission to the regular courts to exercise his right according to the Housing and Property Claims Commission decision is still ongoing which deems the Referral before the Constitutional Court premature.

48. In this respect, the Court reiterates 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 and that the legal order of the country will provide an effective remedy for the violation of its provisions (*see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94. Decision of 28 July 1999*).
49. In these circumstances, the Court concludes that the Applicant has not exhausted all legal remedies available to him under applicable law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Rules 36 (1) h) and 56 (2) of the Rules of Procedure, on 30 April 2013, unanimously

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. 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;
- III. This Decision is effective immediately.

Judge Rapporteur



Prof. Dr. Ivan Čukalović



President of the Constitutional Court



Prof. Dr. Enver Hasani