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

Prishtina, 2 June 2017
Ref. No.:RK 1078/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI30/16

Applicant

CONSORTIUM "ALFA.i" L.L.C. & "INFRATEK"

Constitutional review of Judgment E. Rev. no. 44/2015, of the Supreme Court of Kosovo, of 18 November 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 Consortium "ALFA.i" L.L.C. & "INFRATEK" with HQ in Rakosh of Istog (hereinafter: the Applicant), represented by Muhamet Shala, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges Judgment E. Rev. no. 44/2015, of the Supreme Court, of 18 November 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment E. Rev. no. 44/2015, of the Supreme Court, of 18 November 2015, which the Applicant alleges that it violates Article 31 [Right to Fair and Impartial Trial], Article 7 [Values], Article 3 [Equality Before the Law] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the Convention).

4. The Applicant requests the imposition of interim measure and ban on execution of the challenged decision of the Supreme Court.

Legal basis

5. The Referral is based on Article 21.4 and 113.7 of the Constitution, Articles 27, 47 and 48 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 29 and 55 (4) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 12 February 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 14 March 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues and Selvete Gërxhaliu Krasniqi (members).

8. On 25 April 2016, the Court notified the representative of the Applicant about the registration of the Referral. On the same date, a copy of the Referral was sent to the Municipality of Prishtina and the Supreme Court.

9. On 13 January 2017, the President of the Court appointed Judge Ivan Čukalović as member of the Review Panel, replacing Judge Robert Carolan, who resigned from the position of the Judge of the Court on 9 September 2016. The Review Panel was appointed in the following composition of judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi (members).

10. On 17 January 2017, the Court requested the Basic Court in Prishtina to submit additional documents regarding the Referral of the Applicant. The Supreme Court was notified about the Court's request for additional documents addressed to the Basic Court in Prishtina.

11. On 24 January 2017, the Basic Court in Prishtina submitted additional documents.

12. On 31 March 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

13. On 23 January 2009, the Applicant and the Municipality of Prishtina entered into an agreement for drafting the road project called "Internal Ring - Eastern part".

14. On an unspecified date, the Applicant filed a statement of claim with the Basic Court in Prishtina against the Municipality of Prishtina due to disagreements over the compensation of the additional works.

15. On 18 February 2014, the Basic Court in Prishtina in the main hearing and in the presence of litigating parties, by Judgment C. no. 271/2013, decided as it follows:

> *"I. The statement of claim of the claimants Consortium Alfa-i l.l.c and Infratek with HQ in Istog is approved as grounded in entirety.*
>
> *II. The responding party the Municipality of Prishtina is obliged to pay to claimants a total amount of 89.760,00 (eighty and nine thousand and seven hundred and sixty) euro on behalf of drafting the project Internal Ring-Eastern Part-tender no. 61608336211, with annual interest rate of 8% starting from the date of submission of claim until the final payment, all within the deadline of 7 (seven) days, from the date this judgment becomes final under the threat of forced execution."*

16. The Basic Court, *inter alia*, reasoned that it rendered the decision for approval of the statement of claim of the Applicant Company basing largely on the provisions of the agreement of 23 January 2009 concluded between the litigants and the provisions of the decision on incorporation of the road infrastructure projects approved by the Municipality of Prishtina on 29 March 2012.

17. The Municipality of Prishtina filed an appeal with the Court of Appeal against the Judgment of the Basic Court, claiming the existence of essential violation of the procedural rules, erroneous and incomplete determination of factual situation and erroneous application of the substantive law.

18. On 8 May 2015, the Court of Appeal by Judgment Ae. No. 107/2014 rejected the appeal of the respondent Municipality of Prishtina as ungrounded and upheld the Judgment of the Basic Court.

19. The Court of Appeal, *inter alia*, stated that the Judgment of the Basic Court was reasoned, the factual situation was determined correctly and completely and that there was no violation of the procedural and substantive law. The

Court of Appeal also added that the competent persons of the Municipality of Prishtina approved the change of the project and additional costs to the Applicant for completing the project under the provisions of their agreement.

20. The Municipality of Prishtina filed a request with the Supreme Court for revision of the decisions of the Basic Court and the Court of Appeal, claiming the existence of essential violations of procedural provisions and erroneous application of the substantive law, with a proposal that the decisions of the lower instance courts be modified and the statement of claim of the Applicant be rejected.

21. It transpires from the documents included in the Referral that the Applicant Company did not respond to the revision of the Municipality of Prishtina, although it was notified in accordance with the provisions of the applicable procedural law.

22. On 18 November 2016, the Supreme Court by Judgment Rev. E. No. 44/2015 approved the revision of the Municipality of Prishtina as grounded, modified the judgments of the Basic Court and the Court of Appeal and rejected the statement of claim of the Applicant.

23. The Supreme Court reasoned that the lower instance courts have erroneously applied the substantive law when they determined that the statement of claim of the Applicant is grounded, because, in the present case, the consent to the change of the project was not given by the competent authority of the Municipality of Prishtina.

24. In this respect, the relevant part of the Judgment of the Supreme Court reads:

> *"Article 24.1 of the mentioned Law stipulates that the Procurement Officer of a contracting authority is the only authorized person that may conclude or sign a public agreement on behalf of the contracting authority. A public agreement signed by anyone else except the Procurement Officer of the contracting authority is invalid and inapplicable. In this present case the consent for changing the project was not given by the respondent's Public Procurement Office, and the respondent's procurement department with its letter of 10.04.2013 did not accept the claimants' claim for the payment of the additional work. Pursuant to Article 22.2 of the agreement concluded between the litigating parties is stipulated that the Contracting Authority is entitled to make any changes to the agreement, and the consent for the additional work was not given to the Contracting Authority – respondent respectively the Procurement Office. Therefore, the respondent's revision claims in this sense are grounded and based on the reasons provided above it was decided as in the enacting clause of this Judgment pursuant to Article 224.1 of LCP."*

Applicant's allegations

25. The Applicant alleges that the abovementioned decision of the Supreme Court was rendered by violating Article 31 [Right to Fair and Impartial Trial], Article

7 [Values], Article 3 [Equality Before the Law] of the Constitution, in conjunction with Article 6 [Right to a fair trial] of the Convention.

26. The Applicant alleges that: "*Supreme Court of Kosovo in Prishtina, by Judgment E. Rev.no.44/2015 of 18.11.2015, did not assess the additional part of work at the amount of up to 10% of the total value of the agreement of 23.01.2009 with identification no. 616 08 336 211 entitled "Drafting of the Internal Ring Project – Eastern Part", a fact that was found by that court in the above mentioned Judgment. Although it specifically emphasized the legal provision of Article 34 item (iii) of the Law on Public Procurement, which envisaged that the execution of additional work and similar works which are covered with an agreement, may be performed by the same contractor, if the additional work does not exceed 10% of the value of the basic agreement. Whereas it is not contentious the fact that the additional work pursuant to the above mentioned agreement was ordered explicitly by the Contracting Authority – Prishtina Municipality, while the orders as such were approved by the competent authorized authority pursuant to the law – Municipal Assembly, and were executed by the contractor – Consortium "ALFA.i" Sh.p.k. & "INFRATEK" located in Rakosh – Istog.*"

27. The Applicant further alleges that: "*The provision of Article 7 of the Constitution of the Republic of Kosovo stipulates that: The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law. Therefore, in this specific case this principle has been violated by Judgment E.Rev.no.44/2015 of 18.11.2015 of the Supreme Court of Kosovo in Prishtina, in which this court did not assess the additional part of work at the amount of 10% of the total value of the agreement... Additionally this provision of Article 7, quoted above, stipulates the principle of the right to property as well.*"

28. Regarding the respect of the principle of equality of arms, the Applicant alleges that: "*the Supreme Court of Kosovo in Prishtina upon reviewing the revision submitted against Judgment Ae. No. 107/2014 of 08.05.2015 of the Court of Appeal of Kosovo in Prishtina, by denying to the Applicant the opportunity to present his case at the court hearing, was based unilaterally in the establishing of incorrect conviction pertaining to the unnecessary need to perform the additional work to the public interest of Prishtina Municipality.*"

29. Finally, the Applicant requests the Court to impose interim measure and to declare invalid the challenged judgment of the Supreme Court.

Admissibility of the Referral

30. The Court first examines whether the Applicant fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

31. In this respect, the Court refers to Article 113.7 of the Constitution, which establishes:

"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."

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

Article 48
Accuracy of the Referral

"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."

33. The Court further takes into account Rule 36 (2) (d) of the Rules of Procedure, which specifies:

Rule 36
Admissibility Criteria

"(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."

34. In the present case, the Court notes that the Applicant is an authorized party to submit the Referral, has exhausted all legal remedies in accordance with Article 113.7 of the Constitution and the Referral was submitted within the deadline of 4 (four) months as established in Article 49 of the Law.

35. The Court should also determine whether the Applicant has specified and substantiated the allegations filed in accordance with Article 48 of the Law.

36. The Court notes that the Applicant raises two allegations: (i) The Supreme Court has committed a constitutional violation when it approved the revision of the responding party and rejected the statement of claim of the Applicant filed for compensation for additional work and (ii) the Supreme Court acted unilaterally when reviewing the revision because the Applicant was not invited or was not given an opportunity to present its case at a court hearing.

37. Regarding the first allegation of the Applicant that has to do with the approval of the revision by the Supreme Court and the rejection of the statement of claim of the Applicant, the Court considers that it has to do with the establishment of facts and the interpretation of laws by regular courts during the court proceedings conducted before it.

38. 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).

39. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See *mutatis mutandis Garcia Ruiz v. Spain* [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-1).

40. The Constitutional Court recalls that it is not a fact-finding Court and thus the correct and complete determination of the factual situation is within the full jurisdiction of the regular courts. The role of the Constitutional Court is to ensure compliance with the constitutional standards during the court proceedings before the regular courts and cannot, therefore, act as a "fourth instance court" (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment 6 of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012 and case No. KI86/16, Applicant *"BENI" Trade Company*, Resolution on Inadmissibility, of 11 November 2016).

41. The Court reiterates that its role is to assess whether the proceedings before the regular courts were fair in entirety, including the way the evidence was taken (See case *Edwards v. United Kingdom*, No. 13071/87, Report of European Commission on Human Rights, of 10 July 1991).

42. Regarding the claim of the Applicant for violation of the principle of equality of arms, the Court notes that the documents contained in the Referral show that the regular courts sent to the Applicant a copy of the revision filed by the responding party, as required by the respective provisions of the procedural law; however, the Applicant had not provided any response to the revision presented by the responding party.

43. In this respect, the Court wishes to reiterate that in principle, the litigating parties enjoy the right to participate in the public court hearings in accordance with Article 31 of the Constitution and Article 6.1 of the Convention. The public hearing protects the litigants against the administration of justice in secret with no public scrutiny (*Diennet v. France,* paragraph 33; *Martinie v. France,* [GC], paragraph 39).

44. However, the Court further reiterates that non-holding of a court hearing in the second or third instance of a judiciary may be justified by the special features of the proceedings at issue, provided a public hearing has been held at first instance (see for instance *Helmers v. Sweden*, paragraph 36). So the appeal deals only with the questions of law, but not with the questions of fact, may be in accordance with the requirements of Article 31 of the Constitution and Article 6 of the Convention, although the Applicant may not have been provided an opportunity to be heard personally by the Court of Appeal and the Supreme Court (see, *Miller v. Sweden*, paragraphed 30).

45. Therefore, unless there are exceptional circumstances that justify dispensing with a public court hearing, the right to a public hearing under Article 31 of the Constitution and Article 6 § 1 of the Convention entails an entitlement to an oral hearing at least in the proceedings before a first instance court (*Fischer v. Austria,* paragraph 44; *Salmonsson v. Sweden,* paragraph 36).

46. In the present case, the Court notes that we are not dealing with a violation of the principle of equality of arms because the Applicant has been given the opportunity to respond to the revision of the opposing party, which from the content of the Referral can be concluded that it did not do that, that the public court hearing was held in the first instance court, and that based on the elaboration of the current case law of the European Court of Human Rights, non-holding a public hearing in the second and third instance court does not constitute in itself a violation of the principle of equality of arms (see, for example, case no. KI74/16, Applicant X, Resolution on Inadmissibility of the Constitutional Court of the Republic of Kosovo, of 16 November 2016 and other references mentioned in that decision).

47. In addition, the Court notes that the Applicant has had the benefit of adversarial proceedings; that it was able, at the various stages of those proceedings, to adduce the arguments and evidence it considered relevant to its case; that it had the opportunity of challenging effectively the arguments and evidence adduced by the opposing party; that all its arguments which were relevant to the resolution of the case were duly heard and examined by the courts; that the factual and legal reasons for the impugned decision were set out at length. Accordingly, it results that the proceedings taken as a whole were fair (See the Case of *Garcia Ruiz v. Spain*, [GC], application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

48. From the above, the Court considers that the Applicant has not sufficiently substantiated its allegations for constitutional violation. Accordingly, the Referral is to be declared inadmissible, as manifestly ill-founded on constitutional basis.

Request for interim measure

49. The Applicant requested the imposition of the interim measure against the challenged decision of the Supreme Court without elaborating in what manner it would suffer irreparable damage, in case the challenged decision is implemented or how that decision violates the public interest (See, for example, case no. KI86/16, Applicant *"BENI" Trade Company*, Resolution on Inadmissibility, of 11 November 2016).

50. As to the request for interim measure, the Court refers to Article 27 of the Law, which refers:

Interim Measures

> *"The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest."*

51. In addition, the Court further refers to Rules 55 (4) of the Rules of Procedure which specifies:

"[...] Before the Review Panel may recommend that the request for interim measures be granted, it must find that:

(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral."

52. As mentioned above, the Applicant has not shown *a prima facie* case on the admissibility of the Referral. Therefore, the request for interim measure is to be rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.7 of the Constitution, Articles 27 and 48 of the Law, and Rules 36 (2) (d) and 55 (4) of the Rules of Procedure, on 31 March 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for interim measure;

III. TO NOTIFY this Decision to the Parties;

IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and

V. This Decision is effective immediately.

Judge Rapporteur

Bekim Sejdiu

President of the Constitutional Court

Arta Rama-Hajrizi