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

Prishtina, on 5 May 2021
Ref. No.:RK1767/21

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RESOLUTION ON INADMISSIBILITY

in

case no. KI92/19

Applicant

„HUBO INTERNATIONAL N.V."

Constitutional review of Judgment E. Rev. No. 31/2018 of the Supreme Court of Kosovo of 28 January 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by the company „HUBO INTERNATIONAL N.V", (hereinafter: „HUBO INTERNATIONAL N.V"), from Belgium (hereinafter: the Applicant), represented by Albert Islami, from Ferizaj.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment [E. Rev. No. 31/2018] of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) of 28 January 2019, which was served on the Applicant on 12 February 2019.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment of the Supreme Court, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Article 24 [Equality Before the Law], and Article 31 [Right to Fair and Impartial Trial] 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 ECHR).

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [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 Court

5. On 7 June 2019, the Applicant submitted the Referral to the Court.

6. On 12 June 2019, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

7. On 24 December 2019, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 24 December 2019, the Court requested the Basic Court in Prishtina to submit to the Court the acknowledgment of receipt indicating the date when the Applicant was served with the challenged Judgment [E. Rev. No. 31/2018] of 28 January 2019.

9. On 13 January 2020, the Basic Court in Prishtina submitted a copy of the acknowledgment of receipt proving that the Applicant received the challenged Judgment on 12 February 2019.

10. On 25 March 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court to declare the Referral inadmissible.

Summary of facts

11. On 2 April 2007, the Applicant concluded a contract for the sale of goods with RIVA MARKET HUBO L.L.C. from Ferizaj (hereinafter: RIVA MARKET), on the basis of which contract, the Applicant delivered the goods to RIVA MARKET, however RIVA MARKET did not pay the contracted amount to the Applicant.

12. On 2 August 2007, RIVA MARKET signed a guarantee agreement with the insurance company „SIGAL" from Prishtina (hereinafter: SIGAL insurance), based on which SIGAL insurance issued a guarantee (no. 10032007/532) for the Applicant guaranteeing delayed payment for more than 90 days up to a maximum amount of € 400,000 with a time limit covering the period from 2 August 2007 to 2 August 2008.

13. On 1 August 2008, after the contractual amount of money for the delivered goods had not been paid, the Applicant attempted to *fax* a request to activate the SIGAL insurance guarantee, but due to certain difficulties he failed, therefore on the same day he sent the request for activation of the guarantee via e-mail to the email address of the person in charge of SIGAL Insurance.

14. SIGAL insurance did not activate the guarantee (no. 10032007/532) claiming that the request for activation of the guarantee was not submitted in accordance with the contractual obligations.

15. On an unspecified date, the Applicant filed a lawsuit against SIGAL Insurance in the District Commercial Court in Prishtina, requesting that SIGAL Insurance undertake to pay to the Applicant the amount provided as a guarantee in connection with the payment of the contractual debt, which RIVA MARKET owes to the Applicant.

16. On 21 October 2009, the District Commercial Court in Prishtina rendered Judgment I.C. no. 239/2009, rejecting the statement of claim of the Applicant as ungrounded. The reasoning of the Judgment states that the Applicant, *„The claims of the claimant, that he informed the respondent about the Guarantee by e-mail are unsubstantiated as they do not meet the conditions under the Guarantee, because according to its paragraph 6, it is provided "Any request regarding this guarantee must be sent by registered mail or verified telex/swift, as well as reach us by the expiration date of the Guarantee, otherwise it will not be considered valid. Such a request regarding this Guarantee must state the reasons for the above request and indicate the termination of payment for the requested amount". It follows that requests from this Guarantee should have been sent only through registered and verified mail, as well as reaching the expiration date of the Guarantee - in this case, no action has been taken under these terms. [...] did not comply with the Guarantee and*

the conditions which are provided in the Guarantee as the Guarantee had a condition to be realized at the time of its validity. The claimant has not proved by anything that he has acted according to the conditions foreseen in the guarantee by sending the information by registered mail and he has not managed to realize the guarantee by the expiration date".

17. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against Judgment (IC No. 239/2009) of the District Commercial Court in Prishtina, of 21 October 2009 due to violation of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of substantive law.

18. On 24 April 2014, the Court of Appeals, by Judgment Ae. No. 98/2012, rejected, as ungrounded, the Applicant's appeal and upheld in entirety the Judgment (I.C. No. 239/2009) of the District Commercial Court in Prishtina of 21 October 2009.

19. On an unspecified date, the Applicant filed a request for revision with the Supreme Court against the Judgment of the Court of Appeals, on the grounds of violation of the provisions of the contested procedure and erroneous application of the substantive law.

20. On 16 July 2014, the Supreme Court rendered Decision E. Rev. No. 31/2014, by which it approved the revision of the Applicant, annulling the decisions of the Court of Appeals and the District Commercial Court and ordering the first instance court to ascertain in a repeated procedure the fact whether it is true that the fax of the respondent did not work on the disputed day, which prevented the claimant from sending letters - documents under the guarantee, therefore proposed to the court to hear witness A.P. to clarify the circumstances of communication with the representative of the respondent for sending documents and non-functioning of fax and finally render a legal decision.

21. On 20 July 2015, acting on the order of the Supreme Court, the Basic Court in Prishtina, Department of Economic Matters, in repeated proceedings, rendered Judgment C. No. 524/2014, by which it rejected the Applicant's claim as ungrounded. The reasoning of the judgment states, *inter alia*, *„The court after analyzing all the evidence and facts has assessed that the statement of claim of the claimant is ungrounded for the fact that the guarantee of the claimant after 02.08.2008 has expired and the latter has not been confirmed that it has continued as this has not been proven by any evidence relevant with reference to the provision of Article 6, Article 8, Article 16 and Article 19 of ICC 458 of the International Chamber of Commerce which provisions expressly define the obligations arising from the guarantee, and therefore based on the cited above the claimant's statement of claim has rejected it in its entirety as ungrounded".*

22. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the Judgment (C. No. 524/2014) of the Basic Court in Prishtina, Department of Economic Affairs of 20 July 2015, due to

violations of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law.

23. On 28 April 2017, the Court of Appeals, by Decision Ae. No. 175/2015, approved, as grounded, the Applicant's appeal, annulling the Judgment (C. No. 524/2014) of the Basic Court in Prishtina, Department of Economic Affairs of 20 July 2015, as well as ordering that the case be remanded to the first instance court for retrial.

24. In the reasoning of the decision of the Court of Appeals, *inter alia*, he alleges, *"The first instance court in the re-procedure did not follow the instructions of the Supreme Court of Kosovo regarding the full determination of the factual situation, because it did not assess with special care each piece of evidence separately and all together, but unilaterally forgiving more trust in the statements of the parties to the material evidence. In the present case it was not disputed that there was a guarantee agreement between the parties regarding the granting of credit funds of 02.08.2007, which was valid until 02.08.2008, by which the respondent Company of Sigal Insurance has been obliged to pay the maximum amount of 400.000.00 euro, in cases when "RIVA MARKET HUBO" LLC does not make the transaction "delays payment', at least 90 days from the submission of the request of HUBO INTERNATIONAL, NV., but the fact has not been confirmed whether the above-mentioned agreement was valid.*
Failure to prove the validity of the contested evidence, as evidence which has a direct impact on the issuance of a lawful and fair judgment, constitutes a violation of the provision of Article 183.1 of the LCP, which determines whether there is an erroneous or incomplete determination of the factual situation when the court has erroneously established a decisive fact, namely when such a fact has not been established at all.
The first instance court completely ignored the other circumstances for establishing the factual situation because it did not prove whether it is legally valid to send the disputed documents even if the respondent's fax did not work on the disputed day, which prevented the claimant from sending documents under guarantee".

25. On 2 October 2017, acting on the order of the Court of Appeals, the Basic Court in Prishtina, the Department of Economic Affairs, in the repeated proceedings, rendered Judgment Ek. No. 221/2017, by which approved the claimant's statement of claim that SIGAL insurance is obliged to pay the claimant the amount provided by the guarantee, in order to rpay the contractual debt that RIVA MARKET owed to the claimant. The reasoning of this judgment states, *inter alia* that, *„in the agreement concluded between the litigants with no. 100320077/532 dated; 02.08.2007, as well as the confirmation of the receipt of the email Mr. Anila Pishtari, dated; 01.08.2008, at 17:30 minutes, therefore, based on the provisions of Article 1087 and Article 1088 of the Law on Obligations (1978), the court has decided as noted in point one of the enacting clause of this judgment.*
The court in deciding on the assessment of all evidence presented by the litigants is based on Article 8 paragraph 1 and paragraph 2 of the LCP,

regarding the partial deadline is based on the provision of Article 509 point of the LCP, while regarding the calculation of legal interest as stated in the enacting clause of this judgment is based on the provision of Article 277 of the LOR (1978), while regarding the refusal of legal interest of 8% from 20.12.2012, the court is based on the provision of Article 1057 of the LOR of Kosovo ".

26. On an unspecified date, SIGAL filed an appeal with the Court of Appeals against the Judgment (Ek. No. 211/2017) of the Basic Court in Prishtina, Department for Commercial Matters of 2 October 2017, for violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

27. On 22 May 2018, the Court of Appeals, by Judgment Ae. No. 285/2017, approved as grounded, the appeal pf SIGAL insurance, modifying the Judgment (Ek. No. 221/2017) of the Basic Court in Prishtina, Department for Commercial Matters, on 2 October 2017, in such a way that the Applicant's statement of claim was rejected as ungrounded. The reasoning of this judgment states,

„The first instance court in the reasoning of the challenged judgment states that it has taken the decision based on the agreement concluded between the litigants with no. 10032007/532, of 02.08.2007 as well as the confirmation of email from Mrs. Anila Pishtari, of 01.08.2008, at 17:30, and Igo constitute the entire reasoning regarding the merits of the statement of statement of claim. The Court of Appeals found that the court of first instance did not provide an answer regarding the essential issue in this dispute, if the e-mail received which the court of first instance refers to, constitutes a legally valid request for the execution of the contested guarantee?

The Court of Appeals assessed such a conclusion of the first instance court and has found that such a legal position cannot be accepted as fair and lawful because according to the assessment of this court on such a factual situation, the substantive law has been erroneously applied, when the court of first instance has found that the statement of claim of the claimant is grounded, because the court of first instance based its decision on irrelevant facts and with erroneous interpretation of legal provisions.

The Court of Appeals found that the first instance court has erroneously applied the provisions of Article 1087 and Article 1088 of the Law on Obligations, because in the present case the last paragraph of the "Guarantee" stipulates that: the parties have agreed that this guarantee will be administered in accordance with the Uniform Rules for Requirements (ICC Publication 458 - in Albanian RRUGKP 458). Belgian law will apply to any matter that cannot be resolved under the Uniform Rules for Requirements. Therefore, from this paragraph results in the present case, that the application of the Law on Obligations is excluded. Moreover, even if the provisions of Article 1087 and Article 1088 of the LOR are applied, it determines the rights and obligations of the parties from the bank guarantee, but in this case the dispute between the parties was the fact that a legal

request was submitted and in the form provided by the guarantee contract, for the payment of the guarantee amount.
From the case file it results that the claimant has not submitted the request for activation of the guarantee in the form and manner determined by the contractual provisions of the Guarantee, which stipulates decisively that: any request regarding this guarantee must be sent by registered mail or verified telex/swift, as well as to arrive until the expiration date of the guarantee, otherwise it will not be considered valid. Such a claim in connection with this Guarantee shall state the reasons for the abovementioned claim and indicate termination of payment of the amount claimed.
In the present case the claimant with no evidence has managed to prove that he sent the request in the registered mail or through verified telex/swift, but on 01.08.2008, after regular working hours he tried to send the request by fax. After contacting Mrs. Anila Pishtari, asked her to respond in order to send the documents as they are of an urgent nature, without specifying what documents are in question. Mrs. Anila Pishtari replied that she could send the document to her e-mail address. After that the representative of the claimant Mr. Karin Lox, wrote to him that he is sending the full document (dd 20080801) regarding the activation of the guarantee for RIVA MARKET HUBO LLC, reasoning that he cannot send the complete file by fax because the respondent's fax does not give a signal . [...] admissible and legally valid only if it is made in the form and manner specified in the guarantee namely if it contains all the specified documents and if it is sent in the manner and address specified in the guarantee and before the expiration of the term.
Therefore, all the reasons of the claimant regarding the manner of delivery, communication address, delays and lack of documentation, in the opinion of this court, are ungrounded and without legal effect because based on the above provisions the claimant had full responsibility to submit the request to the guarantor according to the terms of the guarantee, within the term determined by the guarantee, regardless of the problems that may arise in transmission or telecommunication. In this regard the respondent as Guarantor bears no responsibility and has rightly rejected the claim. Based on the above, and the fact that there is sufficient evidence in the case file to fully establish the factual situation, the Court of Appeals finds that the court of first instance on the factual situation erred in applying the substantive law when it found that the claimant's statement of claim is grounded, therefore the challenged judgment should have been modified and the statement of claim as such be rejected.

28. On an unspecified date, the Applicant filed a request for revision with the Supreme Court against the Judgment of the Court of Appeals, on the grounds of violation of the provisions of the contested procedure and erroneous application of the substantive law.

29. On 28 January 2018, the Supreme Court rendered Judgment E. Rev. No. 31/2018, by which it rejected the revision of the Applicant as ungrounded, upholding in entirety the Judgment (Ae. No. 285/2017) of the Court of

Appeals of 22 May 2018. In the reasoning is alleged that "*The Supreme Court of Kosovo considers that the second instance court has rightly concluded that the guarantee expired on 2.8.2008 and has no legal effect. In par. 6 of the guarantee is marked the exact manner of sending the request which must be by registered mail or verified telex/swift, as well as to reach the guarantor until the expiration date of the guarantee, otherwise it will not be considered valid. Whereas, the allegation mentioned in the revision that the judgment of the court of second instance was rendered with essential violation of Article 103 par. 2 of the LCP, as stated, that the sending of documents is legally valid when submitted by e-mail also, the Supreme Court of Kosovo, assessed as ungrounded, because in the guarantee no. 10032007/532, the manner of delivery is precisely defined, while the information by e-mail does not meet the stated requirements of the guarantee, and as such is invalid.*

Applicant's allegations

30. The Applicant alleges that Judgment E. Rev. No. 31/2018 violated Article 24 [Equality Before the Law] as well as Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

31. The Applicant alleges that the challenged Judgment of the Supreme Court, „*contains essential violation of Article 24 of the Constitution of the Republic of Kosovo and consequently the Supreme Court by incorrectly applying the substantive law on the basis of negative selection to the detriment of the claimant, creates inequality, injustice, arbitrariness, subjectivism, bias and, consequently, discrimination against the Applicant*".

32. The Applicant alleges that Article 31 of the Constitution and Article 6 of the ECHR have been violated because the challenged Judgment „*of the Supreme Court E. rev. No. 31/2018 of 29.01.2019 is in flagrant contradiction with the evidences administered by the first instance court, which even have the quality of the force of proving absolute accuracy and truthfulness according to the provision of Article 329, par. 1 and 2 of the LCP and that, according to Article 321, par. 2 and 4 of the LCP, such facts are not proven but are taken as proven. Precisely for these reasons the Supreme Court by the challenged judgment has violated the constitutional guarantee for a correct, fair, impartial and regular trial*".

33. The Applicant also alleges that, „*The Supreme Court, by its judgment E. rev. no. 3112018 of 28.01.2019 with arbitrary and abusive actions did not guarantee not only a fair and just process but did not guarantee the equality of the parties involved in this procedure by discriminating against the claimant with the negative selection of evidence*".

34. The Applicant further alleges that „*from the procedures followed referring to the challenged judgment it results without any doubt and in a certain manner that the Supreme Court by substantially violating the provisions of Articles 24 and 31 of the Constitution of the Republic of Kosovo has not*

provided the claimant with a fair, impartial, and equal trial vis a vis the other party, which has very harmful repercussions not only for the claimant as a foreign investor, but also affects the inequality of foreign investors in relation to the domestic companies".

35. The Applicant requests the Court to declare his Referral admissible, to annul Judgment E. Rev. No. 31/2018 of the Supreme Court of 28 January 2019, on the grounds of violation of Article 24 (Equality Before the Law) as well as Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the ECHR, as well as to remand the case for reconsideration.

Admissibility of the Referral

36. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and foreseen by the Rules of Procedure.

37. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

> *"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".*

38. The Court also refer to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes: *"Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

39. In this regard, the Court initially notes that the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms, applicable both to individuals and to legal persons (See, case of the Court No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

40. The Court further examines if the Applicant has met the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

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

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".

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision..." .

41. With regard to the fulfillment of these criteria, the Court finds that the Applicant submitted the Referral in the capacity of an authorized party, challenging the act of a public authority, namely Judgment E. Rev. No. 31/2018, of the Supreme Court of 28 January 2019, after the exhaustion of all legal remedies. The Applicant also clarified the fundamental rights and freedoms that he claims to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadline set out in Article 49 of the Law.

42. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraph (2) of the Rules of Procedure, which establishes:

"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

43. The Court initially notes that the abovementioned rule, based on the case law of the European Court of Human Rights (hereinafter: the ECtHR) and of the Court, enables the latter to declare inadmissible referrals for reasons related to the merits of a case. More precisely, based on this rule, the Court may declare a referral inadmissible based on and after assessing its merits, namely if it deems that the content of the referral is manifestly ill-founded on constitutional basis, as defined in paragraph 2 of Rule 39 of the Rules of Procedure.

44. Based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as „manifestly ill-founded" in its entirety or only with respect to any specific claim that a referral may constitute. In this regard, it is more accurate to refer to the same as „manifestly ill-founded claims". The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that qualify as claims of „fourth instance"; (ii) claims that are categorized as „clear or apparent absence of a violation"; (iii) „unsubstantiated or unsupported" claims; and finally, (iv) „confused or farfetched" claims. (See, more precisely, the concept of inadmissibility on the basis of a referral assessed as „manifestly ill-founded", and the specifics of the four above-mentioned categories of claims qualified as „manifestly illfounded", The Practical Guide to the ECtHR on Admissibility Criteria of 31 August 2019; part III. Inadmissibility Based on Merit; A. Manifestly ill-founded applications, paragraphs 255 to 2 284).

45. In the context of the assessment of the admissibility of the referral, namely, the assessment of whether the Referral is manifestly ill-founded on constitutional basis, the Court will first recall the merits of the case that this referral entails and the relevant claims of the Applicant, in the assessment of which the Court will apply the standards of the case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

46. The Court recalls that the Applicant alleges that the challenged decision violated, (i) the rights guaranteed by Article 24 [Equality Before the Law] of the Constitution, and (ii) the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR.

47. The Court notes that the Applicant repeats the same arguments he presented in the proceedings before the regular courts, that the regular courts have dealt with this matter, therefore, in the following paragraphs the Court will further elaborate on the proceedings in the regular courts.

(i) Regarding the alleged violations of the rights guaranteed by Article 24 [Equality Before the Law] of the Constitution

48. With regard to the present case, the Court finds that the Applicant alleges allegations of a violation of Article 24 of the Constitution in relation to unequal treatment. Bringing the allegations in relation to the present case, as well as the guarantees and principles of Article 24 of the Constitution, the Court notes that, in essence, all the allegations in relation to its assertion are brought by the Applicant in the context of erroneous application of substantive law.

49. However, the Court also notes that the Applicant, apart from an allegation of unequal treatment in relation to the unfairness of the proceedings due to erroneous application of the substantive law, did not present any

evidence that could indicate that there has been a discrimination, namely that he was treated differently in relation to another party in the same or similar situation, and this does not even result from the documents submitted to the Constitutional Court.

50. Therefore, the Court considers that the allegations of unequal treatment of the Applicant are random, and the possible arbitrariness of the courts in this proceeding is not evident. In view of all the above, the Court considers that the Applicant's allegations of violation of the prohibition of discrimination under Article 24 of the Constitution are manifestly (*prima facie*) ill-founded.

51. The Court considers that the mere fact that the Applicant does not agree with the outcome of the court proceedings, is not sufficient to build a reasoned allegation of a constitutional violation. The Court recalls that when alleging such violations of the Constitution, the Applicant must provide reasoned allegations and convincing arguments (see, in this regard, case of the Constitutional Court, KI136/14, Resolution on Inadmissibility of 10 February 2015, *Abdullah Bajqinca*, paragraph 33).

52. Therefore, in the light of the foregoing, and having regard to the allegations made by the Applicant and the facts presented by him, the Court also referring to the standards established in the case-law of the Court in similar cases as well as in the case law of the ECtHR, finds that the Applicant has not proved and has not sufficiently substantiated his allegations of violation of his fundamental rights and freedoms guaranteed by the Constitution and ECHR.

53. Therefore, the Referral and allegations concerning Article 24 of the Constitution are manifestly ill-founded on constitutional basis, and must be declared inadmissible in accordance with paragraph (2) of Rule 39 of the Rules of Procedure.

(ii) Regarding allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

54. The Court also finds that the Applicant emphasizes the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court notes that the substance of the allegation of violation of the Applicant's right to fair and impartial trial is based on the view that the Court of Appeals and the Supreme Court have erroneously determined the factual situation regarding the procedure for activating the guarantee (no. 10032007/532) and that they have erroneously applied the substantive law when concluding that the predefined requirements for activation of Guarantee have not been respected.

55. In fact, the Applicant considers that the Judgments of the Court of Appeals and of the Supreme Court, *"have dealt with substantial violations of Article 224 of the LCP. This is because due to the erroneous application of substantive law and essential violations of Article 214, par. 1, subpar. b) of the LCP, the factual situation has not been established"*.

56. The Court notes that the Court of Appeals, by Judgment Ae. No. 285/2017, rejected the Applicant's allegation as ungrounded and reasoned in detail the manner in which the guarantee contract provided for the activation of the guarantee

i. Regarding the application of the law, the Court of Appeals stated:

"the first instance court has erroneously applied the provisions of Article 1087 and Article 1088 of the Law on Obligations, because in the present case the last paragraph of the "Guarantee" stipulates that: the parties have agreed that this guarantee will be administered in accordance with the Uniform Rules for Requirements (ICC Publication 458 - in Albanian RRUGKP 458). Belgian law will apply to any matter that cannot be resolved under the Uniform Rules for Requirements. Therefore, from this paragraph results in the present case, that the application of the Law on Obligations is excluded. Moreover, even if the provisions of Article 1087 and Article 1088 of the LOR are applied, it determines the rights and obligations of the parties from the bank guarantee, but in this case the dispute between the parties was the fact that a legal request was submitted and in the form provided by the guarantee contract, for the payment of the guarantee amount".

ii. Regarding the admissibility of the request, the Court of Appeals stated:

"...From the case file it results that the claimant has not submitted the request for activation of the guarantee in the form and manner determined by the contractual provisions of the Guarantee, which stipulates decisively that: any request regarding this guarantee must be sent by registered mail or verified telex/swift, as well as to arrive until the expiration date of the guarantee, otherwise it will not be considered valid".

57. The Supreme Court, by Judgment Rev. No. 31/2019, rejected as ungrounded the request for revision of the Applicant, stating:

"...The Supreme Court of Kosovo considers that the second instance court has rightly concluded that the guarantee expired on 2.8.2008 and has no legal effect. In par. 6 of the guarantee is marked the exact manner of sending the request which must be by registered mail or verified telex/swift, as well as to reach the guarantor until the expiration date of the guarantee, otherwise it will not be considered valid. Whereas, the allegation mentioned in the revision that the judgment of the court of second instance was rendered with essential violation of Article 103 par. 2 of the LCP, as stated, that the sending of documents is legally valid when submitted by e-mail also, the Supreme Court of Kosovo, assessed as ungrounded, because in the guarantee no. 10032007/532, the manner of delivery is precisely defined, while the information by e-mail does not meet the stated requirements of the guarantee, and as such is invalid.
[...]

The allegation of the revision that the second instance court did not apply Article 1087 and Article 1083 par. 1 of the LOR, referring to the guarantee, the Supreme Court of Kosovo, considers that the above mentioned articles are related to bank guarantees, while in this case we are dealing with the establishment of obligation relations between the litigants based on the guarantee of 2.8.2007 and based on the fact that the parties have agreed on the essential components, it can be assessed that the obligatory-contractual relationship has been established as provided in Article 26 of the LOR, which relationship obliges the parties to comply with conditions mentioned. Therefore, the allegation that the second instance court applied the substantive law incorrectly when it rejected the statement of claim of the claimant, is ungrounded".

58. In this regard, , the Court must reiterate that the Applicant in the Referral before it, in essence, submits allegations regarding the erroneous determination of facts and the erroneous application of substantive law by the regular courts, allegations, which the Court, in its consolidated case law, considers as "*fourth instance allegations* ".

59. In this connection, the Court based on the case law of the ECtHR, but also taking into account its specifics, as defined through the ECHR (see: in this context, for clarification pursposes the ECtHR Practical Guide on Admissibility Criteria of 30 April 2019; part I. Inadmissibility based on merits; A. Manifestly ill-founded claims, 2. „*Fourth instance*", paragraphs 262 and 263), the principle of subsidiarity and the doctrine of the fourth instance, it has consistently emphasized the difference between „*constitutionality*" and „*legality*" and has asserted that it is not its duty to deal with errors of fact or erronesous interpretation and application of the law, allegedly committed by a regular court, unless and in so far as such errors may have infringed the rights and freedoms protected by the Constitution and/or the ECHR (see, in this context, *inter alia*, the cases of the Court KI128/18, Applicant: *Limak Kosovo International Airport J.S.C., "Adem Jashari"*, Resolution of 28 June 2019, paragraph 55; KI62/19, Applicant: *Gani Gashi*, Resolution on Inadmissibility of 19 December 2019, paragraphs 56 -57; KI110/19, Applicant: *Fisnik Baftijari*, Resolution on Inadmissibility of 7 November 2019, paragraph 40).

60. The Court has also consistently stated that it is not the role of this Court to review the findings of the regular courts concerning the factual situation and the application of substantive law and that it cannot assess by itself the facts which have led a regular court to render one decision rather than another. Otherwise, the Court would act as a court of „fourth instance", which would result in exceeding the limits imposed on its jurisdiction (see, in this context, the case of the ECtHR *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28 and references used therein, and see also the cases of Court KI128/18, cited above, paragraph 56, and KI62/19, cited above, paragraph 58).

61. The Court also emphasizes the fact that in the assessment of allegatinos of *„the fourth instance"* which are related to alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, it has also consistently stated that „justice" requested by the aforementioned articles is not „substantial" justice but „procedural" justice. This concept mainly in practical terms, in principle, implies (i) the possibility of adversarial proceedings; (ii) the possibility for the parties at various stages of these proceedings to bring arguments and evidence that they consider relevant to the relevant case; (iii) the ability to effectively challenge arguments and evidence presented by the opposing party; and (iv) the right that their arguments, which, objectively, are relevant to the resolution of the case, be properly heard and examined by the courts; and that, consequently, the procedure, taken as a whole, would turn out to be fair (see, also ECtHR Practical Guide of 30 April 2019 on Admissibility Criteria; Part I. Inadmissibility Based on Merit; A. Manifestly ill-founded claims; 2. „Fourth instance", paragraph 264 and the references mentioned therein). Moreover, the assessment of the fairness of a procedure in its entirety is one of the main premises of case law of the Court and that of ECtHR (see, in this context, the case of the ECtHR *Barbera, Messeque and Jabardo v. Spain*, Judgment of 6 December 1988, paragraph 68; and cases of the Court KI128/19, cited above paragraph 58; and KI22/19, Applicant: *Sabit Ilazi*, Resolution on Inadmissibility of 07 June 2019, paragraph 42).

62. In the circumstances of the present case, the Court emphasizes that, the Applicant in addition to the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as a result of erroneous determination of facts and erroneous interpretation of law, does not substantiate in a sufficient manner nor does it argue before the Court how this interpretation of the applicable law by the regular courts may have been „manifestly erroneous", resulting in „arbitrary conclusions" or „manifestly unreasonable" for the applicant, or that the proceedings before the regular courts, as a whole, may not have been fair or even arbitrary. In addition, the Court finds that the regular courts have taken into account all the facts and circumstances of the case, the allegations of the Applicant filed in the claim, the appeal and the revision, and reasoned the latter (see, in this regard, case of the Court KI64/20, Applicant: *Asllan Meka,* Resolution on Inadmissibility of 3 August 2020, paragraph 41 and KI22/19, cited above paragraph 43).

63. Therefore, the Applicant's allegations of erroneous determination of facts and erroneous interpretation and application of the applicable law regarding the procedure for activation of the guarantee, are qualified as allegations falling into the „fourth instance" category and as such, reflect allegations at the level of „legality", and are not substantiated at the level of „constitutionality". Therefore, the latter are manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

Conclusion

64. Therefore, the Court finds that with regard to the Applicant's allegations of violation of the rights guaranteed by Article 24 of the Constitution, these allegations of the Applicant are considered as allegations falling into category (iii) of the "*unsubstantiated or unreasoned*" allegations, and with regard to the Applicant's allegations of violation of the rights guaranteed by Article 31 of the Constitution, these Applicant's allegations are qualified as allegations that fall into the category (i) of the allegations that are considered as "*fourth instance*" allegations. Therefore, the latter are manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 20 of the Law and Rule 39 (2) of the Rules of Procedure, in its session held on 26 March 2021, 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**

Bajram Ljatifi Arta Rama-Hajrizi

Kopje e vërtetuar
Overena kopija
Certified Copy

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