



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

Prishtina, on 19 December 2016
Ref. no.: RK1019/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI123/15

Applicant

Ali Zenuni

**Constitutional review of Judgment Rev. no. 50/2014, of the Supreme
Court of Kosovo, of 2 June 2015**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Mr. Ali Zenuni, residing in Prishtina (hereinafter: the Applicant), who is represented by lawyer Skënder Musa.

Challenged decision

2. The challenged decision is Judgment Rev. no. 50/2014 of the Supreme Court of Kosovo, of 2 June 2015, which was served on the Applicant on 14 September 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged decision of the Supreme Court, which allegedly violated the Applicant's rights guaranteed by the Constitution, without invoking any constitutional provision in particular.

Legal basis

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

Proceedings before the Constitutional Court

5. On 13 October 2015, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 5 November 2015, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Arta Rama-Hajrizi and Bekim Sejdiu.
7. On 1 December 2015, the Court informed the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
8. On 20 October 2016, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 21 December 2009, ProCredit Bank issued two bank guarantees on behalf of the beneficiary, the Company "Tayas Gida San" for securing the demands that resulted from the contractual relationships between the Company "Tayas Gida San" and the Applicant.
10. On 28 January 2011, due to the opposition by ProCredit Bank to fulfill its obligations, the Company "Tayas Gida San" filed a claim with the District Commercial Court in Prishtina, against ProCredit Bank, by requesting the fulfillment of material obligation arising from the bank guarantees.
11. On 8 March 2011, ProCredit Bank filed a response to the claim, by rejecting in entirety the claim *"as not being based on the law and not supported by evidence and facts."*

12. On 7 April 2011, the District Commercial Court in Prishtina (Judgment I. C. no. 18/2011) approved the statement of claim, obliging the ProCredit Bank to meet the material obligation to the Company "Tayas Gida San."
13. The Judgment further emphasizes *"the statement of claim of the claimant the company "Tayas Gida San" is approved, [...] and the respondent ProCredit Bank in Kosovo-Prishtina is obliged to pay to the claimant, on behalf of fulfilling the obligation, the amount of 58.393.27 euro with an annual interest rate of 3.5%, starting from the date of the submission of the claim [...]. The court considers that the respondent is obligated in executing the guarantee in case the request is provided by beneficiary [...]. The Bank guarantee issued from the respondent is irrevocable and unconditional [...] under the aforementioned and applied law it results that the respondent is not allowed to reject the fulfillment of obligation from guarantee, claiming that the conditions contracted within parties have not been properly regulated, furthermore when the respondent did not confirm by any evidence its claims."*
14. On 15 February 2012, the Applicant filed a request that in accordance with Article 271 of the Law on Contested Procedure, due to legal interest to be recognized the capacity of the intervener to the proceedings with the responding party.
15. On an unspecified date, ProCredit Bank filed an appeal with the Court of Appeal against Judgment I. C. no. 18/2011 of 7 April 2011, of the Commercial Court in Prishtina.
16. On 10 July 2014, the Court of Appeal of Kosovo (Judgment Ae. no. 299/2012), approved the proposal of the Applicant to be a party to the proceedings, while it rejected as ungrounded the appeal of the ProCredit Bank.
17. The Judgment further emphasizes *"the court of first instance determined completely the factual situation [...]. Bank guarantee is a strictly formal act therefore needs to be strictly fulfilled as issued. The claims from the appeal that the guarantee is subject to Uniform Regulation on requesting the guarantee is ungrounded due to fact that Uniform Regulation nby LOR provisions in Chapter XXXVIII, pertaining `first demand` guarantee are in total harmony and on both cases obligate the issuer of guarantee to act and fulfill his obligation on first appeal submitted by the beneficiary."*
18. On an unspecified date, the Applicant filed a request for revision with the Supreme Court against Judgment Ae. no. 299/2012, of 10 July 2014, of the Court of Appeal of Kosovo.
19. On 2 June 2015, the Supreme Court of Kosovo (Judgment E. Rev. no. 50/2014) partially approved the request, and modified Judgment Ae. no. 299/2012 of 10 July 2014, of the Court of Appeal of Kosovo only in terms of annual interest, while as regards the other part, the revision is rejected as ungrounded.

20. In the Judgment is further added that *“the Supreme Court of Kosovo finds the legal stance and the reasoning of the lower instance courts as fair and lawful [...]. Within the meaning of Article 1087 of LOR it has been specified that if bank guarantee withholds the above mentioned clause or contains words with similar meaning, the bank shall not raise against the beneficiary of guarantee, here the claimant the objections which the issuer of guarantee N.T.P “Drini Commerce” can raise toward beneficiary related to the secured obligations [...]. The Supreme Court of Kosovo finds that the decision regarding the approved interest rate is unacceptable [...].”*

Applicant’s allegations

21. The Applicant does not specify what provision of the Constitution has been violated by the challenged decision.
22. The Applicant alleges that *“[...] the District Commercial Court has not given equal access to the court, based on the claim of “Tayas Gida San - Turkey” against ProCredit Bank, even though the demand should have been fulfilled by the N.T “Drini Commerce”, it did not notify it at all as regards the participation in the sessions – proceeding [...].”*
23. The Applicant further alleges that: *“The Judgment of the Supreme Court of 02.06.2015 is among other non-comprehensible and procedurally unlawful where the trial panel with its Presiding Judge on the top rendered this abusive judgment.”*
24. The Applicant concludes by requesting the Court:

“By this Referral, we want to be held that there are violations of the law in the aforementioned Judgments; non-determination of the factual situation. Thus, we request that these Judgments be annulled and the case be remanded for retrial.”

Admissibility of the Referral

25. The Court shall first examine whether the Applicant has met the admissibility requirements laid down in the Constitution, and as further specified in the Law and the Rules of Procedure.
26. In this respect, the Court refers to Article 113, of the Constitution, which establishes:
- 7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”*
27. The Court also refers to Article 48 of the Law [Accuracy of the Referral], which stipulates that:

“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.”

28. The Court further takes into account Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, which provides that:

“(1) The Court may consider a referral if:

[...]

(d) the referral is prima facie justified or not manifestly ill-founded.

(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

[...]

(d) the Applicant does not sufficiently substantiate his claim. ”

29. In the present case, the Court notes that the Applicant does not explicitly refer to a violation of any right guaranteed by the Constitution, however, the Applicant in substance, raises allegations of a violation of the right to fair and impartial trial.
30. The Court recalls that the Applicant alleges *“the Commercial Court did not provide him equal access to the Court.”*
31. Regarding the Applicant’s allegations that associates in violation of Article 31 [Right to Fair and Impartial Trial], the Applicant alleges that he was not given the opportunity of equal access to regular courts and that the Applicant was denied the right to be a party in the court proceedings.
32. In this regard, the Court notes that the Applicant was not a party to the proceedings in the first instance, but the Court of Appeal approved the Applicant’s request to be *“intervener to the proceedings.”*
33. In addition, the Court refers to the Judgment of the Supreme Court, which concluded that the reasoning of the decisions of the lower instance courts were clear and comprehensible and that it contained sufficient reasons and evidence crucial to rendering a lawful decision. Furthermore, the Court considers that the Supreme Court specifically addressed and elaborated the basic allegations of the Applicant regarding essential violations of the contested procedure provisions and whether the decisions of the lower instance courts were based on the established facts.
34. The Supreme Court, further emphasizes in the Judgment that *“the appealed allegation of the intervener in the revision that second instance court has violated Article 214.1 in conjunction with Article 182.2 of LPC do not stand because the second instance court in its judgment has reasoned over crucial facts which are also accepted by the court of revision.”*
35. Accordingly, the Court concludes that all the Applicant’s arguments, relevant to the resolution of the dispute were examined by the regular courts; that the

factual and legal reasons for the impugned decision were set out at length; and that, based on the above, the proceedings before the regular courts, taken as a whole, were fair.

36. The Court also reiterates that the correct and complete determination of the factual situation is a full jurisdiction of regular courts. The role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and, therefore, cannot act as a “fourth instance court” (See case *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65. See also *mutatis mutandis*, case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
37. Although a regular court has a certain margin of appreciation when choosing arguments and admitting evidence, Article 6.1 of the ECHR does not require a detailed answer to each and every argument provided to the court during the conduct of the proceedings (See *Suominen v. Finland*, No. 37801/97, ECtHR, Judgment of 24 July 2003, para 36; *Van de Hurk v. the Netherlands*, No. 16034/90, ECtHR, Judgment of 19 April 1994, para 61; *Jahnke and Lenoble v. France* (déc.); *Perez v. France* [GC] No. 47287/99, ECtHR, Judgment of 12 April 2004, para 81; *Ruiz Torija v. Spain*, No 18390/91, ECtHR, Judgment of 09 December 1994, para 29; *Hiro Balani v. Spain*, No. 18064/91. ECtHR, Judgment of 9 December 1994 para. 27).
38. The Court considers that the Applicant has not sufficiently substantiated his allegations and has not proven a violation of his rights protected by the Constitution. Moreover, he failed to show that the proceedings before the regular courts, including the Supreme Court were unfair or arbitrary or that his rights and freedoms have been violated.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 48 of the Law, and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, in the session held on 20 October 2016, 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 effective immediately;

Judge Rapporteur



Altay Suroy



President of the Constitutional Court



Arta Rama-Hajrizi