



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE

УСТАВНИ СУД

CONSTITUTIONAL COURT

Prishtina, 28 August 2015
Ref. No.: RK 829/15

RESOLUTION ON INADMISSIBILITY

in

Case No. KI168/14

Applicants

Mabco Constructions and Eurokoha-Reisen

**Constitutional review of the Judgment AC-I-13-0045-A0001,
of the Appellate Panel of the Special Chamber of the Supreme Court of
Kosovo on Privatization Agency Related Matters,
of 26 June 2014**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge and
Bekim Sejdiu, Judge

Applicants

1. The Applicants are Mabco Constructions, with the seat in Lugano, Switzerland and Eurokoha-Reisen, with the main seat in Frankfurt, Germany, represented by its branch in Prishtina. The Applicants are represented by Mr. Bajram Morina, practicing lawyer in Gjakova.

Challenged decision

2. The Applicants challenge the Judgment AC-I-13-0045-A0001, of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of the SCSC), of 26 June 2014, which refused the Applicants' submission to intervene on the side of the claimant.
3. The challenged decision was served on the Applicants on 14 July 2014.

Subject matter

4. The subject matter of the Referral is the constitutional review of the Judgment (AC-I-13-0045-A0001, of 26 June 2014), of the Appellate Panel of the SCSC which, according to the Applicants' allegations violated their rights guaranteed by Article 3 [Equality Before the Law], Article 7 [Values], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], Article 54 [Judicial Protection of Rights] and Article 119 [General Principles] of Chapter IX [Economic Relations] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

5. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 56 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 14 November 2014, the Applicants sent the Referral by post to the Court. The Court received the Referral on 17 November 2014.
7. On 24 November 2014, the President of the Court, by Decision GJR. KI168/14, appointed Judge Arta Rama-Hajrizi as Judge Rapporteur. On the same date, the President by Decision, KSH. KI168/14, appointed the Review Panel, composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Kadri Kryeziu.
8. On 1 December 2014, the Court notified the Applicants of the registration of Referral. On the same date, the Court submitted a copy of the Referral to the Special Chamber of the Supreme Court (hereinafter: the SCSC) and to the Privatization Agency of Kosovo (hereinafter: the PAK).
9. On 5 December 2014, the Court sent a letter with a copy of this Referral for information to NTP Unio Commerce, Zelqif Berisha, owner who filed Referral KI167/14, which Referral challenges the same Judgment of the Appellate Panel of the SCSC.

10. On 9 December 2014, the Court requested the SCSC to provide a copy of the receipt of service, which shows when the Judgment of the Appellate Panel of the SCSC (AC-I-13-0045-A0001 of 26 June 2014) was served on the Applicant.
11. On 13 December 2014, the SCSC submitted to the Court the copy of the receipt of service, which shows that the Judgment of the Appellate Panel of the SCSC (AC-I-13-0045-A0001 of 26 June 2014) was served on the Applicant on 14 July 2014.
12. On 17 December 2014, the Court notified the Applicants of the Decision of the Court to reject the request for Interim Measures in the related Case KI 167/14 pending the final outcome of the Referral. (See Decision on Interim Measure, published on 17 December 2014)
13. On 26 June 2015, the President of the Court appointed Ivan Čukalović as Judge Rapporteur, replacing Arta Rama-Hajrizi. On the same date, by Decision of the President of the Court, Arta Rama-Hajrizi was appointed as member to the Review Panel, replacing Enver Hasani, whose mandate as Constitutional Court Judge ended on 26 June 2015.
14. On 6 July 2015, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court to declare the Referral as inadmissible.

Summary of facts

As to the privatization of the Grand Hotel

15. In 2005, as a part of the privatization process, the Kosovo Trust Agency (hereinafter: KTA), initiated a "Special Spin Off" of sales, through privatization, of the facilities of the Grand Hotel in Prishtina.
16. In 2006, following the completion of the bidding process, background checks and the litigation at the Special Chamber, the KTA announced Zelqif Berisha, owner of the NTP Unio Commerce (Applicant in Case KI167/14) as the winning bidder.
17. On 10 August 2006, the KTA concluded a contract with Zelqif Berisha, owner of the NTP Unio Commerce to sell him the entire share capital of the NewCo Grand Hotel LLC (hereinafter: the Grand Hotel). Consequently, the share capital was transferred in its entirety and the Grand Hotel shares were registered in the Ministry of Trade and Industry in the name of the enterprise NTP Unio Commerce.
18. The contract signed between the KTA and Zelqif Berisha obliged him to meet certain requirements as specified in the Commitment Agreement. These requirements included the obligation to make certain financial investments in the building of the Grand Hotel and to maintain the employment of a certain number of employees within a certain time frame. A failure to meet these obligations could result in the withdrawal of the shares from the Applicant.

As to the co-ownership of the Applicants

19. Subsequently, in January 2007, Zelqif Berisha, concluded an Agreement of Understanding with the Applicants, whereby he sold 60% of the shares in the Grand Hotel to the Applicants.
20. On 5 June 2007, the Applicants initiated civil proceedings before the Municipal Court in Prishtina in an attempt to confirm the co-ownership over the shares of the Grand Hotel.
21. On 28 May 2009, the Municipal Court in Prishtina (Judgment, C. No. 1429/2007) approved the Applicants' claim and confirmed the Applicants' co-ownership over the shares of the Grand Hotel.

As to the withdrawal of shares by the PAK Board of Directors

22. On 31 May 2012, the Board of Directors of PAK, the legal successor of the KTA, determined that the enterprise NTP Unio Commerce had not acted in full compliance with employment and investment commitments that were defined in the Commitment Agreement. Therefore, the Board of PAK unanimously decided to exercise the Share Call Option and as such withdraw all the shares purchased by the NTP Unio Commerce.
23. As a result of the Decision of the PAK Board of Directors, the shares and the facilities of the Grand Hotel are now under PAK administration.
24. On 8 June 2012, NTP Unio Commerce, Zelqif Berisha, owner (Applicant in case KI167/14) filed a claim with the SCSC, challenging the validity of the Decision of the PAK Board of Directors dated 31 May 2012 to exercise a Share Call Option on the shares of the Grand Hotel. In addition it had also filed a request for preliminary injunction, which request was rejected as ungrounded by the Specialized Panel of the SCSC (Decision, C-I-12-0042 of 29 June 2012). Following an appeal against the Decision of the Specialized Panel of the SCSC filed by NTP Unio Commerce, Zelqif Berisha, owner (hereinafter: NTP Unio Commerce), the Appellate Panel of the SCSC (Decision, AC-I-12-0042 of 27 September 2012), approved the appeal as partly grounded and decided: *"to restrain the KPA from alienating the shares of the NewCo Grand Hotel to any third parties until the final decision regarding the merits of the claim."*
25. On 20 March 2013, the Specialized Panel of the SCSC (Judgment, C-I-12-0042 of 20 March 2013) rejected the claim filed by NTP Unio Commerce as ungrounded, reasoning that the violations of the Commitment Agreement by NTP Unio Commerce were egregious and that the PAK Decision to exercise the withdrawal of the shares of the Grand Hotel was valid.
26. Following the appeal filed by NTP Unio Commerce against the Judgment of the Specialized Panel of the SCSC (C-I-12-0042 of 20 March 2013), on 26 June 2014, the Appellate Panel of the SCSC rejected as ungrounded the appeal and upheld the aforementioned Judgment of the Specialized Panel of the SCSC.

27. As mentioned in paragraph 9, NTP Unio Commerce submitted a Referral to the Court, challenging the same Judgment of the Appellate Panel of the SCSC, of 26 June 2014. Thus, for the purposes of a full presentation of the completed procedures before the SCSC concerning the claim and appeal filed by NTP Unio Commerce, the Court wishes to refer to the summary of facts established in Case KI167/14.

As to the Applicants' submission to intervene at the SCSC

28. On 10 January 2014, while the appeal of the Claimant (NTP Unio Commerce, owner Zelqif Berisha and Applicant in case KI167/14) was pending before the Appellate Panel of the SCSC, the Applicants filed a submission to intervene on the side of the Claimant in the proceedings before the Appellate Panel of the SCSC.
29. In their submission, the Applicants requested to be recognized in the capacity of the interveners in the proceedings before the Appellate Panel of the SCSC. The Applicants further claimed that pursuant to Article 271 of the Law on Contested Procedure they met the requirements to be recognized in their capacity as the intervening party in this process.
30. On 14 February 2014, PAK in its capacity of the respondent filed an objection to the Applicants' submission, with the reasoning that the Applicants had no legal and material relation with PAK, but only an Agreement of Understanding concluded with Zelqif Berisha, owner of the NTP Unio Commerce.
31. On 31 February 2014, NTP Unio Commerce in the proceedings before the Appellate Panel of the SCSC also filed an objection to the Applicants' submission, stating that the Applicants are unlawfully requesting ownership rights over the Grand Hotel and thus they had no legitimacy in this matter.
32. On 26 June 2014, the Appellate Panel of the SCSC (Judgment, AC-I-13-0045-A0001) refused the submission of the Applicants.
33. In its Judgment, the Appellate Panel of the SCSC decided that, since both the Claimant (NTP Unio Commerce, owner Zelqif Berisha) and the Respondent (PAK) objected the legitimacy of the interveners as parties in the proceedings, pursuant to Article 270, paragraph 1, of the Law on Contested Procedure the Appellate Panel refused the Applicants' submission to be recognized as interveners in the proceedings before the SCSC.

Applicants' allegations

34. As mentioned above, the Applicants allege that the Judgment of the Appellate Panel of the SCSC (AC-I-13-0045-A0001 of 26 June 2014, refusing their submission to intervene on the side of the claimant in the proceedings before the Appellate Panel of the SCSC violated their rights guaranteed by Article 3 [Equality Before the Law], Article 7 [Values], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution.

35. The Applicants state the following: *"Because having been ignored by PAK, for proceeding with the legitimization of real shareholders, because of amendment of KTA – PAK laws that is inconsistent with the Agreement on the protection of foreign investments, [...], because of ungrounded rejection of the request of the INTERVENERS to be the party in contested proceedings on the side of the claimant before the Special Chamber, because there is a grounded suspicion of interference with methods of organized crime by the governmental institutions and because they did not respect the legitimate human rights and disregard, respectively they acted contrary to terms of international agreements for the protection of foreign investments [...]"*.
36. The Applicants further allege a violation of Article 119 [General Principles] of Chapter IX [Economic Relations] of the Constitution. In this relation, the Applicants claim that they are foreign investors and that *"[...] the amendment of the PAK Law, which was recognized as the primary basis to deny the right of INTERVENERS, is contrary to the agreement on the protection of foreign investments in Kosovo, namely the agreement on the protection of foreign investments with Switzerland and the Federal Republic of Germany. In fact, the share purchase agreement with the claimant (Zelqif Berisha) was concluded at the time when the Law on KPA was in force, while the decision to call the share option was based on the law after the reorganization of PAK, which in this case should not have retroactive effect."*
37. Finally, the Applicants conclude by requesting the Court to compel the SCSC to recognize the Applicants as intervening party in the proceedings in relation to the withdrawal of shares in the Grand Hotel by the Board of Directors of PAK.

Admissibility of the Referral

38. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to examine whether the Applicant has met the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.
39. The Court takes into account Article 48 of the Law, which provides:

"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".
40. The Court also refers to Rule 36 of the Rules of Procedure, which provides:

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

[...], or

(b) *the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or*

[...]

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

41. The Court notes that, in 2007, the Applicants had initiated civil proceedings on confirmation of co-ownership over the shares of Grand Hotel Prishtina before the Municipal Court in Prishtina.
42. However, the Court considers that these civil proceedings do not fall within the scope of the Referral and therefore the Court will only review the proceedings before the SCSC related to the subject matter of the Referral.
43. As mentioned above, the Applicants allege violation of their rights guaranteed by Article 3 [Equality Before the Law], Article 7 [Values], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], Article 54 [Judicial Protection of Rights] and Article 119 [General Principles] of Chapter IX [Economic Relations] of the Constitution.
44. In this regard, the Court notes that the Applicants only listed and described the content of the aforementioned provisions, but did not present any arguments or evidence in support of their allegations.
45. Furthermore, the Court reiterates that dissatisfaction with a judicial decision, or merely the mentioning of articles and provisions of the Constitution, does not suffice for the Applicants' allegations to rise to the level of a constitutional violation. When alleging constitutional violations, the Applicant must present convincing and indisputable arguments to support the allegations, for the referral to be considered grounded (See Case No. KI198/13, *Privatization Agency of Kosovo*, Resolution on Inadmissibility of 13 March 2014).
46. The Court considers that the Applicants have not explained how and why the conclusion of the Appellate Panel of the SCSC to refuse their submission to be recognized as interveners on the side of the Claimant in the proceedings before the SCSC has allegedly violated their rights and freedoms.
47. Furthermore, the Court reiterates that it is not its task under the Constitution to substitute the role of the regular courts in respect of the decisions taken by the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. (See case *Garcia Ruiz v. Spain*, No. 30544/96, ECHR, Judgment of 21 January 1999; see also case KI70/11 of the Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).
48. Furthermore, the Court notes that the Applicants are primarily not satisfied with the legal qualification of facts and the law applied by the Appellate Panel of the SCSC. The legal qualification of facts and applicable law are matters which fall within the scope of legality.
49. In this respect, the Court reiterates that it is not the duty of the Constitutional Court to deal with errors of facts or law (legality) allegedly committed by

regular courts, unless and in so far as they may have infringed rights and freedoms guaranteed by the Constitution (constitutionality).

50. Finally, the Applicants have not presented any convincing arguments to establish that the alleged violations mentioned in the Referral represent constitutional violations (see case *Vanek v. Republic of Slovakia*, No. 53363/99, ECtHR, Decision of 31 May 2005) and did not specify how the referred articles of the Constitution were violated, as required by Article 113.7 of the Constitution and Article 48 of the Law.
51. Based on the foregoing, the Court concludes that the Applicants have not justified the allegation of a violation of constitutional rights and freedoms invoked by them and the Applicants have not sufficiently substantiated their allegations.
52. In addition, as mentioned above, the Applicants raise the question of compatibility of the PAK Law with international bilateral agreements concluded and ratified by the Republic of Kosovo.
53. As mentioned above, the Applicants claim that *“the amendment of the PAK Law, which was recognized as the primary basis to deny the right of INTERVENERS, is contrary to the agreement on the protection of foreign investments in Kosovo, namely the agreement on the protection of foreign investments with Switzerland and the Federal Republic of Germany [...]”*.
54. The Court also refers to Article 19 [Applicability of International Law] of the Constitution that establishes that:
 1. *International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are directly applied except for cases when they are not self-applicable and the application requires the promulgation of a law.*
 2. *Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.*
55. In this regard, the Court reiterates that it is not empowered to review the compatibility of laws with international agreements. The Court in its case law has also reiterated that it is not empowered to review whether an international agreement is in conformity with the Constitution (See Referral KO95/13, Applicants: *Visar Ymeri and 11 other deputies*, Judgment of 2 September 2013, paras. 100 and 101).
56. Therefore, regarding the Applicants’ allegation that the PAK Law is not in conformity with the international bilateral agreements ratified by the Republic of Kosovo, the Court holds it is not within its jurisdiction *ratione materiae* to review the constitutionality of laws with international agreements.
57. For the foregoing reasons, the Court concludes that Referral is to be declared:

- a) Inadmissible because it is not within the Court's jurisdiction *ratione materiae* to review the constitutionality of laws with international agreements; and
- b) Inadmissible by reason of being manifestly ill-founded because the Applicants have not justified the allegation of a violation of constitutional rights and freedoms invoked by them and the Applicants have not sufficiently substantiated their allegations.

FOR THESE REASONS

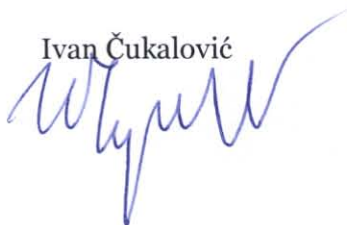
The Constitutional Court, pursuant to 48 of the Law and Rule 36 (2), b) and d) and Rule 36 (3), e) of the Rules of Procedure, on 28 August 2015, unanimously:

DECIDES

- I. TO DECLARE the Referral as Inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur

Ivan Čukalović



President of the Constitutional Court

Arta Rama-Hajrizi

