



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

Prishtina, 6 October 2017
Ref. no.: RK 1135/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI44/17

Applicant

T. P. E. „Theranda – Projekt“

**Constitutional review of Decision
A. No. 503/2006 TAK of the
Independent Review Board
of 17 September 2013**

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 Gërzhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Trade-Production Enterprise „Theranda – Projekt“ from Prizren (hereinafter, the Applicant) which is represented by a lawyer, Ymer Kubati, based on the power of attorney issued by the Director of the Applicant.

Challenged decision

2. The Applicant challenges the decision of the Independent Review Board in the repeated proceedings A. No. 503/2006 TAK of 17 September 2013, which rejected as ungrounded the Applicant's appeal and upheld the Decision of the Appeals Department No.292/2006 dated 04 August 2006.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated a number of legal norms not connected with constitutional violations.

Legal basis

4. The Referral is based on Articles 21 (4) and 113 (7) of the Constitution, Article 47 of Law No. 03/L-121 on the 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 April 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
6. On 18 April 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel, composed of Judges: Ivan Čukalović (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
7. On 26 April 2017, the Court notified the Applicant about the registration of the Referral and requested it to fill in the referral form and submit a power of attorney.
8. On 20 June 2017, the Applicant submitted to the Court a power of attorney and a completed referral form.
9. On 07 September 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 28 March 2006, the Tax Administration of Kosovo (hereinafter, TAK) carried out the tax control operations of the Applicant and issued a notice of the audit and subsequent assessment, according to which the Applicant was responsible of the tax burden in a certain amount.
11. The Applicant filed an appeal with the TAK Appeal Department against the notice of the audit and subsequent evaluation.

12. On 04 August 2006, the TAK Appeal Department (Decision No. 292/2006) rejected the appeal as ungrounded.
13. The Applicant filed an appeal with the Independent Review Board (hereinafter, IRB) against the Decision of the TAK Appeal Department.
14. On 16 October 2006, the IRB (Decision 503/2006) rejected the Applicant's appeal and upheld the decision of the TAK Appeal Department.
15. On 20 November 2006, the Applicant filed with the Supreme Court a claim against the decision of IRB.
16. On 13 November 2008, the Supreme Court (Judgment A. No. 3284/2006) approved the Applicant's claim and remanded the case to the IRB for reconsideration.
17. On 17 September 2013, acting in accordance with the recommendations of the Supreme Court, the IRB (Decision A. No. 503/2006 TAK) decided to reject as ungrounded the Applicant's appeal and to uphold the Decision of the TAK Appeals Department.
18. That Decision of IRB stated, in the legal remedy guidance, that the Applicant *"has the right to file an appeal against this Decision, with the Kosovo Court of Appeals within a term of 60 days from the day of receipt of decision"*.
19. On 8 May 2014, the Applicant filed with the Basic Court in Prizren a proposal for enforcement of the Judgment No. 3284/2006 of the Supreme Court of Kosovo.
20. On 19 February 2015, the Basic Court (Decision CP No. 1070/14) rejected as ungrounded the proposal for enforcement, stating that the judgment to which the Applicant refers *"does not constitute enforcement document"*.
21. On an unspecified date, the Applicant filed with the Basic Court a second proposal for enforcement of the Judgment (No. 3284/2006) of the Supreme Court.
22. On 14 June 2016, the Basic Court (Decision No. 2664/09) rejected the proposal for enforcement as ungrounded, reasoning that *"this judgment does not constitute an executive title in this enforcement proceedings because in this judgment it is ordered that the case be remanded in the repeated proceedings for deciding."*
23. On 5 April 2017, the Applicant filed with the Basic Court in Prishtina an administrative claim against the TAK for annulment of the Decision A. No. 503/2006-TAK of 17.09.2013 of the IRB.
24. On 11 April 2017, the Basic Court in Prishtina (Decision No. 627/17) declared itself without subject matter jurisdiction to deal with that legal matter and

decided to forward the case to the Administrative Matters Department of the Court of Appeals as a competent court for resolving the matter.

Applicant's allegations

25. The Applicant claims a violation of a large number of Articles of the Law No. 03/L-202 on Administrative Conflicts, Law No. 02/L-28 on the Administrative Procedure and Regulation No. 2002/3 on Profit Tax in Kosovo.
26. However, the Applicant makes no reference to any violation of its constitutional rights and related constitutional provisions.
27. Furthermore, the Applicant claims that IRB (Decision No. 503/2006 of 17 September 2013) did not enforce the Judgment (A. No. 3284/2006) of the Supreme Court.
28. Finally, the Applicant requests the Court that "*the Decision of the Independent Review Board –Prishtina A. no. 503/2006 dated 17.09.2006 is annulled*" and the TAK be "*obliged to take a decision for reimbursement of excess taxes paid*".

Admissibility of the Referral

29. The Court examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.
30. In that connection, the Court also refers to §§ 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.*
31. In addition, the Court also refers to § 4 of Article 21 [General Principles] of the Constitution, which provides:
 4. *Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.*
32. The Court further refers to § 2 of Article 47 [Individual Requests] of the Law, which foresees:

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

33. The Court takes into account § (1) (b) of Rule 36 [Admissibility] of the Rules of Procedure, which foresees:
- “The Court may consider a referral if all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.”*
34. The Court considers that the Applicant has not fulfilled the admissibility requirements established in the Constitution, and as further provided by the Law and foreseen by the Rules of Procedure.
35. In fact, the Court recalls that the IRB Decision (A. No. 503/2006) stated that the Applicant *“has the right to file an appeal against this Decision, with the Kosovo Court of Appeals within a term of 60 days from the day of receipt of decision”*.
36. The Court notes that the Applicant has not proved that it filed appeal with the Court of Appeal against the IRB Decision, even though that Decision could have been appealed according to the law in force and the guidance on the right to appeal given by the Decision itself.
37. The Court further recalls that the Applicant submitted the appeal to the Basic Court in Prishtina which declared (Decision No. 627/17) itself incompetent and forwarded the case to the Court of Appeals as the competent court.
38. Finally, the Court concludes that the appeal proceedings before the Court of Appeals are still pending and that the Applicant has not provided evidence that the Court of Appeal has rendered a decision on the Applicant's appeal.
39. The Court considers that the Applicant has not exhausted all legal remedies afforded to him by the applicable law in Kosovo. In fact, the principle of subsidiarity requires that the Applicant exhausts all procedural possibilities in the regular administrative or judicial proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such a violation. (See Constitutional Court Case No. KI07/09, *Demë and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, §§ 18, 28 and 29).
40. The rationale for the exhaustion rule is to afford the regular courts the opportunity to put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order provides an effective legal remedy for the violation of the constitutional rights. (See Constitutional Court case KI41/09 *AAB-RIINVEST University L.L.C. Prishtina v. the Government of the Republic of Kosovo*, Resolution on Inadmissibility of 21 January 2010; see also, *mutatis mutandis*, ECtHR case *Selmouni vs. France*, No. 25803/94, 29 July 1999)
41. In that respect, the Court recalls that the rule of exhaustion of legal remedies under Article 113 (7) of the Constitution, Article 47 of the Law and Rule 36 (1) (b) of the Rules of Procedure obliges those who want to bring their case before the Court to first use the effective legal remedies available under the law

against public authorities' decisions which allegedly have violated their constitutional rights.

42. The Court emphasizes that the rule is based on the assumption, reflected in Article 32 of the Constitution and Article 13 of ECHR that under the domestic legislation there are available remedies to be used before the regular courts in respect of an alleged breach regardless whether or not the provisions of the ECHR are incorporated in national law. (See, *inter alia*, ECtHR case *Aksoy v. Turkey*, Judgment of 18 December 1996, § 51).
43. The Court reiterates that the protection mechanism established by the constitutional system is subsidiary to the regular system of judiciary safeguarding human rights. (See ECtHR case *Handyside v. United Kingdom*, Judgement of 7 December 1976, § 48).
44. In these circumstances, the Court notes that the proceedings are pending before the Court of Appeals and that a final decision has not yet been rendered in the case of the Applicant.
45. Thus, the Court considers that the Applicant's Referral is premature as the legal remedies before the regular courts have not been exhausted yet.
46. Therefore, the Court finds that the Referral is inadmissible according to Articles 113 (1) and (7) of the Constitution, Article 47 (2) of the Law and Rule 36 (1) (b) 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 47 of the Law Rules 36 (1) (b) and 56 of the Rules of Procedure, in the session held on 07 September 2017, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY the Parties of this Decision;
- 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;

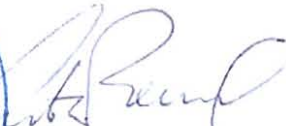
Judge Rapporteur



Almiro Rodrigues



President of the Constitutional Court



Arta Rama-Hajrizi