



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, on 17 December 2014
Ref. no.:VMP 739/14

DECISION ON INTERIM MEASURE

in

Case No. KI167/14

Applicant

**Zelqif Berisha,
owner of NTP Unio Commerce**

**Constitutional review of
the Judgment AC-I-13-0045-A0001, of the Appellate Panel of 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:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Zelqif Berisha, owner of the NTP Unio Commerce, with the seat in the Municipality of Hani i Elezit, represented by Mr. Alexander Borg Olivier, lawyer in Prishtina.

Challenged decision

2. The Applicant challenges 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: SCSC), of 26 June 2014, which upheld the Judgment C-I-12-0042, of the SCSC Specialized Panel, of 20 March 2013.
3. The challenged Judgment was served on the Applicant 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 which, according to the Applicant's allegations violated his rights guaranteed by Article 3 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property], Article 53 [Interpretation of Human Rights Provisions] and Article 54 [Judicial Protection of Rights] of the Republic of Kosovo (hereinafter: the Constitution), and his rights guaranteed by Article 6 [Right to a Fair Trial] and by Article 1 [Protection of Property] of Protocol No. 1 to the European Convention on Human Rights (hereinafter: ECHR).
5. In addition, the Applicant requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose interim measure, namely *"to restrain the KPA, either directly or indirectly, from alienating any property being in the possession of the applicant or to which he may have legal title, including the further alienation of the shares in the New Co Grand Hotel LLC, and any property possessed or being owned or related to the said Company [...]"*.

Legal basis

6. The Referral is based on Article 113.7 and 21.4 of the Constitution, Articles 27 and 47 of the Law no. 03/L-121 on Constitutional Court of the Republic of Kosovo and Rules 54, 55 and 56 (c) of the Rules of Procedure of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 14 November 2014, the Applicant submitted the Referral to the Court.
8. On 24 November 2014, the President of the Court, by Decision GJR. KI167/14 appointed Judge Kadri Kryeziu as Judge Rapporteur. On the same date, the President by Decision, KSH. KI167/14 appointed the Review Panel, composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues and Ivan Čukalović.
9. On 26 November 2014, the Court notified the Applicant on the registration of Referral. On the same date, the Court submitted a copy of Referral to the SCSC and to Privatization Agency of Kosovo (hereinafter: the PAK).

10. On 8 December 2014, the Review Panel considered the Report of the Judge Rapporteur and by majority recommended to the full Court to reject the Request for Interim Measures pending the final outcome of the Referral.

Brief summary of facts

11. 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.
12. After completion of the bidding process, background checks and the litigation at the Special Chamber, the KTA announced the Applicant as the winning bidder.
13. On 10 August 2006, the KTA concluded contract with the Applicant to sell him the entire share capital of the New Co Grand Hotel LLC (hereinafter: the Grand Hotel). Consequently, the share capital was transferred in entirety and the Grand Hotel shares were registered in the Ministry of Trade and Industry in the name of the NTP Unio Commerce.
14. The contract signed between the KTA and the Applicant, obliged the Applicant to meet certain requirements specified in the commitment agreement. Among those requirements were the commitments to implement certain financial investments in the building of the Grand Hotel and employment of a certain number of employees within a certain time limit.
15. On 31 May 2012, the Board of Directors PAK, the legal successor of the KTA, with a justification that the Applicant did not act in full compliance with employment and investment commitments that were defined in the commitment agreement, unanimously decided to withdraw all the shares purchased by the Applicant.
16. As a result of the Decision of the PAK Board of Directors, the shares and Grand Hotel are now under the PAK administration.
17. On 8 June 2012, the Applicant filed a claim with the SCSC. The Applicant also filed a request for interim measure, asking the SCSC to restrain the KPA from alienating the shares of the Grand Hotel to the third parties until the final decision on the merits of the claim.
18. On 29 June 2012, the Specialized Panel of SCSC (Decision C-I-12-0042), rejected the request for interim measure, by reasoning that for the case in question there is no indication that any immediate and irreparable damage may be caused and which cannot be reasonably compensated and by any financial compensation.
19. As a result of the Applicant's appeal, on 27 September 2012, the Appellate Panel of the SCSC (Decision, AC-I-12-0042), approved the Applicant's appeal as partly grounded and decided: *"to restrain the KPA from alienating the shares*

of the New Co Grand Hotel to the third parties until the final decision regarding the merits of the claim.”

20. On 20 March 2013, the Specialized Panel of the SCSC (Judgment, C-I-12-0042 of 20 March 2013), rejected the Applicant's claim as ungrounded, with the reasoning that the PAK Decision to exercise the withdrawal of the shares of the Grand Hotel was valid.
21. Against the Judgment of the Specialized Panel of the SCSC, the Applicant filed an appeal with the Appellate Panel of the SCSC due to substantial violation of procedure, incorrect determination of facts and erroneous interpretation of the material law.
22. On 26 June 2014, the Appellate Panel of the SCSC rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Specialized Panel of the SCSC (C-I-12-0042 of 20 March 2013).
23. In its Judgment, the SCSC concluded as following:

“[...] the Appellate Panel considers that the Claimant has not substantially fulfilled the requirements determined by the commitment agreement and the lack of their fulfillment clearly presents an egregious breach of contractual obligations of the agreement (which in precondition to the rejecting decision), and there was no substantiated objection to this, either by the Claimant himself. From the case file, the Appellate Panel found that there were some submissions by the Respondent sent to the Claimant warning him about exceeding of timeliness for fulfilling the obligations, there were even penalties for such omissions, nevertheless, the Claimant was not able to fulfill the commitments given by the Agreement.”

Applicant's allegations and request for interim measure

24. As stated above, the Applicant alleges that the Judgment of the Appellate Panel of the SCSC (AC-I-13-0045-A0001 of 26 June 2014), upholding the Judgment of the Specialized Panel of the SCSC (C-I-12- 0042 of 20 March 2013) violated his rights guaranteed by the Constitution, namely Article 3 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] Article 46 [Protection of Property], Article 53 [Interpretation of Human Rights Provisions] and Article 54 [Judicial Protection of Rights], as well as his rights guaranteed by Article 6 [Right to a fair trial] and Article 1 [Protection of Property] of Protocol No. 1 to the ECHR.
25. The Applicant, in addition to the request to annul the challenged Judgment, requests from the Court to impose interim measure, namely *“to restrain the KPA, either directly or indirectly, from alienating any property being in the possession of the applicant or to which he may have legal title, including the further alienation of the shares in the New Co Grand Hotel LLC, and any property possessed or being owned or related to the said Company [...]”*.
26. The Applicant reasons that *“Should any further alienation process be undertaken by the PAK at this stage, as shown by the facts of the issue so far,*

severe and irremediable consequences prejudicial to the applicant and which in all probability cannot be adequately satisfied or remedied by financial compensation will occur.”

Assessment of the request for interim measure

27. In order for the Court to grant interim measure in accordance with Article 27 of the Law and Rule 55 (4) and (5) of the Rules of Procedure, it must be determined that:

Article 27 of the Law

1. 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.

Rule 55 (4) of the Rules of Procedure [...]

(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;

(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and

(c) the interim measures are in the public interest.

Rule 55 (5) of the Rules of Procedure

If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application”.

28. In this respect, the Court notes that the Applicant has neither presented any argument nor any evidence why and how the interim measure is necessary to avoid any risk or irreparable damage or that the imposition of this interim measure is in the public interest, as required by Article 27 of the Law on Constitutional Court.
29. A request for imposition of an interim measure must be substantiated on real grounds for a risk or an irreparable damage, the value of which would be irrecoverable in material and monetary aspect. (see, KI187/13, Applicant *N. Jovanović*, Constitutional Court, Judgment of 16 April 2014, paragraph 74).
30. Therefore, the Constitutional Court, without prejudice to any further decision which will be rendered by the Court, on the admissibility or merits of the referral in the future, concludes that the request for interim measure must be rejected as ungrounded.

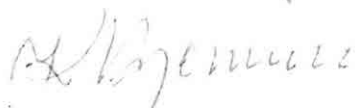
FOR THESE REASONS

The Constitutional Court, pursuant to Article 27 of the Law and Rules 55 (4) and (5) and 56 (c) of the Rules of Procedure, on 8 December 2014, by majority

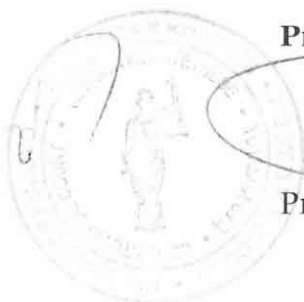
DECIDES

- I. TO REJECT the request for interim measure;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in accordance with Article 20.4 of the Law;
and
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur



Kadri Kryeziu



President of the Constitutional Court



Prof. Dr. Enver Hasani