



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

Prishtina, 30 July 2015
Ref. no.: RK 810/15

RESOLUTION ON INADMISSIBILITY

in

Case No. KI16/15

Applicant

Dragomir Eraković

**Constitutional review of Decision AC-I-14-0044 of the Appellate Panel of
the Special Chamber of the Supreme Court, of 5 September 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

Applicant

1. The Referral is submitted by Mr. Dragomir Eraković from Mitrovica (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision AC-I-14-0044 of the Appellate Panel of the Special Chamber of the Supreme Court (hereinafter: the Appellate Panel), of 5 September 2014, which was served on the Applicant on 17 October 2014.

Subject matter

3. The subject matter is the request for constitutional review of the abovementioned decision of the SCSC. The Applicant claims that this decision has violated Article 24, 31, 32, 46, 54, 159 and 160 of the Constitution and Articles 6, 13 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and item 1 of Protocol 1 of this Convention (hereinafter: the ECHR).
4. The Applicant at the same time requests the imposition of Interim Measure, by which the Court "*would suspend the liquidation proceedings in order to avoid irreparable damage.*"

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of the Law No. 03/L-121 on 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 16 February 2015, the Applicant submitted via mail the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 12 March 2015, by Decision GJR. KI16/15, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur. On the same date, by Decision KSH. KI16/15, the President appointed the Review Panel composed of Judges: Robert Carolan (Presiding), Ivan Čukalović and Enver Hasani.
8. On 29 April 2015, the Court informed the Applicant and the Appellate Panel of SCSC about the registration of the Referral.
9. On 1 July 2015, by Decision GJR. KI16/15, the President of the Court appointed Judge Arta Rama-Hajrizi as a member to the Review Panel replacing Judge Enver Hasani whose mandate in the Constitutional Court ended on 26 June 2015.
10. On 6 July 2015, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the admissibility of the Referral.

Summary of facts

11. On 28 December 1992, the socially owned enterprise "Bair" finished the transformation of the ownership into a joint stock company of mixed ownership, and is registered at the Commercial Court in Prishtina as J.S.C. "Tabak", where Dragomir Eraković was appointed as director of the company and authorized representative.
12. With transformation of the ownership of the socially owned enterprise "Bair", the company employees have acquired total ownership of 8584 shares, which in overall capital makes 49% of the shares. The rest of the shares were in the ownership of JSC "Duvan" Ljubovija (40%) and the Fund for Development of Serbia (11%).
13. In the time period 1999-2001, in accordance with UNMIK Regulation, this enterprise, is transferred under the administration of the Kosovo Trust Agency (now the Privatization Agency of Kosovo), and on 12 September 2001, is registered as a new company "N.P.G.P.D. BAIR".
14. On 14 April 2008, the Applicant submitted to the Privatization Agency of Kosovo (hereinafter: PAK) the notice of intention to file a claim with the Special Chamber of the Supreme Court (hereinafter: the SCSC), in order to protect the rights acquired with the transformation of the ownership, which is made on 28 December 1992.
15. On 31 January 2012 the Applicant in capacity as a director of "L.L.C. Tabak" filed claim No. SCC-12/048 against the PAK for *"compensation of damage due to violation of the ownership rights and disabled rights to claims."*
16. On 23 May 2013, the PAK rendered decision, by which notified all stakeholders that the liquidation proceedings of the newly formed company "N.P.G.P.D. BAIR" have been initiated. At the same time, the PAK invites *"all creditors and owners and all persons alleging to have the right to claim or interest towards the company or assets of the company, to file evidence of claim, starting from 17 June 2013 up to 31 July 2013."*
17. On 30 September 2013, the SCSC requests the Applicant *"to submit a power of attorney authorizing his representative in proceedings before the SCSC as well as evidence that such a power of attorney is issued by a person who is authorized under the applicable law."*
18. By the same order, the Applicant is informed that, if he does not comply with the SCSC order, the Applicant's claim will be rejected as inadmissible.
19. On 14 October 2013, the Applicant submitted the power of attorney to the SCSC, which was issued to Goran Milenković. However, the Applicant in the power of attorney did not refer to his status as a director of "LLC Tabak" nor submitted any evidence, by which he would show that the Applicant is an authorized person to sign a power of attorney on behalf of "LLC Tabak."

20. On 29 January 2014, the SCSC rendered Decision (No. C-I-12-0004) by which the Applicant's claim was rejected as inadmissible because the Applicant failed to show that he possesses active legitimacy in the dispute, as requested by the SCSC order of 30 September 2013.
21. On 14 February 2014, the Applicant filed an appeal with the Appellate Panel of SCSC, by which he requested the repetition of procedure and annulment of the Decision of the SCSC (No. C-I-12-0004).
22. On 5 September 2014, the Appellate Panel of SCSC, by Decision (No. AC-I-14-0044) rejected the Applicant's appeal as ungrounded with the following reasoning:

"... that the claimant could easily present this evidence during the proceedings before the first instance court because this is an old decision of the Commercial Court in Prishtina from 1992 was available to the claimant. However, he did not present that document before the Special Chamber although by the order of 10 September 2013, it was ordered to submit any evidence that would prove that the power of attorney was duly issued by an authorized person in order to serve a purpose which is provided by the applicable law."

"... The emphasis put on the capacity as a Director of the company, while it was not supported by concrete evidence is not sufficient, therefore, the court has rightly requested to clarify with concrete evidence whether the person who issued a power of attorney was authorized by the document under the applicable law ..."

Applicant's allegation

23. The Applicant alleges that the regular courts, by rejecting in both instances the claimant's statement of claim due to lack of active legitimacy violated the "*right of access to court*" and the rights guaranteed by Articles 24, 31, 32, 46, 54, 159 and 160 of the Constitution and Articles 6, 13 and 14 of the ECHR and Protocol 1, item 1 of the ECHR.
24. The Applicant requests the Court to "*declare the Referral admissible... and based on the found violations of human rights to order the PAK... to hold that there has been a violation of the claimant's property rights and to oblige PAK*" to compensate him for the damage due to violation of property rights and to grant compensation for the property, as mentioned on page 17, subparagraph III, of the Applicant's Referral before the Constitutional Court.

Admissibility of the Referral

25. The Court shall examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and Rules of Procedure.
26. The Court refers to Article 113.7 of the Constitution, which provides:

“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, 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.”

28. In addition, the Court recalls Rule 36 (2) (b) of the Rules of Procedure, which provides:

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

...

(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights.”

29. The Court notes that the Applicant based his Referral on *“violation of the right of access to court”* and that all other violations of the Constitution, which the Applicant states in the Referral, arise due to the decisions of the regular courts to reject the statement of claim because of the lack of active legitimacy of the claimant.
30. Furthermore, the Court notes that the Applicant in the proceedings before the regular courts acted as a director of *“LLC Tabak”*, trying to represent the legal person and the interests of the 31 employees as shareholders of the company.
31. However, before the Court he submitted the Referral as an individual, stating that he is pensioner by profession and at the same time he requested the Court to resolve the property issues concerning third parties (other shareholders).
32. The Court notes that the Applicant's allegation of *“violation of the right of access to court”*, where he as a director tried to represent the legal person *“LLC Tabak”*, and the interests of 31 employees as shareholders of the company are not accurate, because on 30 September 2013 the SCSC ordered the Applicant *“to submit a power of attorney authorizing his representative in proceedings before the SCSC as well as evidence that such a power of attorney has been issued by a person who is authorized for this under the applicable law.”*
33. The Applicant was given an opportunity to submit in the proceedings before the SCSC the evidence indicating that he has the authorization to represent the legal person *“LLC Tabak”* and other shareholders. This factual situation was determined by Decision (No. C-I-12-0004 of the SCSC), of 29 January 2014.
34. The Constitutional Court holds that the SCSC Decision (No. C-I-12-0004) and the Decision of the Appellate Panel of the SCSC (No. AC-I-14-0044) provide a reasoned answer as to why the Applicant does not have active legitimacy to represent the legal person *“LLC Tabak”* and other shareholders.

35. Furthermore, the Court notes that the Applicant's allegations of "*violation of the right of access to court*", to him as a natural person and as the owner of a certain number of shares acquired by the transformation of the ownership, are not grounded, because the Applicant failed to submit evidence that he tried to exercise these rights in the proceedings before the regular courts.
36. The Applicant, as well as other shareholder mentioned by the Applicant in the Referral, were provided the possibility to file such claims in the proceedings before the PAK, which by a notification dated 23 May 2013, "*invited all persons claiming to have the right to claim or interest towards the company or assets of the company, to file evidence of claim, starting from 17 June 2013 to 31 July 2013.*"
37. Furthermore, the Court has not examined other violations of the Constitution and the ECHR alleged by that the Applicant, which essentially derive from the violation of the right of access to the court because these Applicant's allegations are not correct and are contrary to the documents which the Applicant submitted to the Court.
38. The Court reiterates that it is not its task under the Constitution to act as a court of fourth instance, 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 vs. Spain*, no. 30544/96, ECHR, Judgment of 21 January 1999; see also case: No. KI70/11, Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility, of 16 December 2011).
39. The Court notes that the Applicant is not, mainly, satisfied with the legal qualification of the facts and the law applied by the regular courts. Legal qualification of the facts and applicable law are matters which fall under the domain of legality.
40. The Applicant has not submitted any *prima facie* evidence of violation of his constitutional rights (see: *Vanek vs. Slovak Republic*, no. 53363/99, ECHR Decision as to admissibility of application, of 31 May 2005).
41. The Court further reiterates that the mere fact that the Applicant is dissatisfied with the outcome of the proceedings in his case, cannot of itself raise an arguable claim for breach of the Constitution (see: *mutatis mutandis*, ECHR Judgment No.5503/02, *Mezotur-Tiszazugi Tarsulat vs. Hungary*, Judgment of 26 July 2005).
42. The Applicant was afforded the opportunity to present his case and to challenge the interpretation of the law, which he considers is wrong, before the PAK, the SCSC and the Appellate Panel of SCSC in the regular court proceedings.
43. After the review of the proceedings in its entirety, the Court has not found that the respective proceedings were in any way unfair or arbitrary (see: *mutatis mutandis*, *Shub against Lithuania*, ECHR Decision on admissibility of application No. 17064/06, of 30 June 2009).

44. The Court considers that the admissibility requirements were not met. The Applicant has failed to show and substantiate the allegation that his constitutional rights and freedoms have been violated by the challenged decision.
45. Therefore, the Referral is manifestly ill-founded and is to be declared inadmissible, in accordance with Rule 36 (2) (b) of the Rules of Procedure.

Request for Interim Measure

46. As it was stated above, the Applicant also requests the Court *“To impose interim measure, by which the Court would suspend the liquidation procedure to avoid the unrecoverable damage”*.
47. In order for the Court to impose Interim Measure pursuant to Rule 55 (4 and 5) of the Rules of Procedure, it is necessary that:

“(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 (...)
(...)*

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

48. As stated above, the Applicant's Referral is inadmissible. For this reason, there is no *prima facie* case for granting Interim Measure. Therefore, the request for Interim Measure must be rejected.

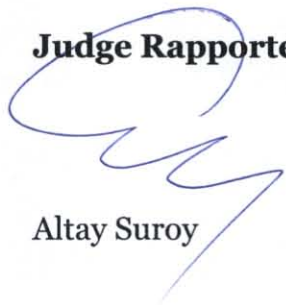
FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 paragraph 7 of the Constitution, Articles 20 and 48 of the Law and Rules 36 (2) (b) and 55 (5) of the Rules of Procedure, in the session held on 30 July 2015, unanimously:

DECIDES

- I. TO DECLARE the Referral as Inadmissible;
- II. TO REJECT the Request for Interim Measure;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 paragraph 4 of the Law;
- V. TO DECLARE this Decision effective immediately.

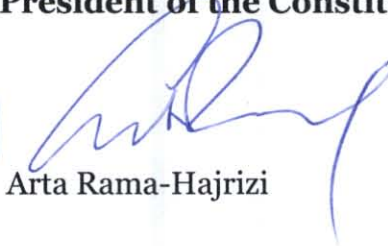
Judge Rapporteur



Altay Suroy



President of the Constitutional Court



Arta Rama-Hajrizi