



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

Pristina, on 12 April 2016
Ref. no.:RK921/16

RESOLUTION ON INADMISSIBILITY

In

Case No. KI17/16

Applicant

Holding Company Fond Inex Interexport a.d.

**Constitutional review of Final Decision No. 10/50 of the Government of
the Republic of Kosovo, of 23 September 2015**

and

**Preliminary Decision No. 06/195 of the Government of the Republic of
Kosovo, of 3 September 2014**

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
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral was filed by Holding Company Fond Inex Interexport a.d., with seat in Belgrade, Serbia (hereinafter, the Applicant). The Applicant is represented by Mr. Marko Ketler, a lawyer from Ljubljana, Slovenia. The latter has authorized nine other lawyers to substitute him, namely Mr. Dragan Karanović, Mr. Dejan Nikolić, Mr. Milan Lazić, Mr. Nemanja Ilić, Ms. Senka Mihaj, Mr. Marko Milanović, Mr. Ognjen Bozović and Ms. Milica Savić, from Belgrade, Serbia and Mr. Veton Qoku, lawyer from Skopje, Macedonia.

Challenged Decision

2. The Applicant challenges the Final Decision No. 10/50 of the Government of the Republic of Kosovo, of 23 September 2015 (hereinafter, the Final Decision) and the Preliminary Decision No. 06/195 of the Government of the Republic of Kosovo, of 3 September 2014 (hereinafter, the Preliminary Decision). Both decisions are related to the expropriation procedure for the purpose of constructing the Brezovica tourist centre.

Subject Matter

3. The subject matter of the Referral is the constitutional review of the challenged decisions, which allegedly violated the rights guaranteed by Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).
4. In addition, the Applicant requests the Court to impose an interim measure, namely *“to suspend the legal effect of the Preliminary and Final decision, until the date of rendering of final decision by the Constitutional court”*.

Legal Basis

5. The Referral is based on Article 21 (4) and 113 (7) of the Constitution, Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter, the Law), and Rules 29 and 54 of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 22 January 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court), through postal services.
7. On 12 February 2016, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Snezhana Botusharova and Bekim Sejdiu.

8. On 19 February 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of it to the Government of the Republic of Kosovo (hereinafter, the Government).
9. On 17 March 2016, the Court deliberated on the case and decided to declare the Referral inadmissible and to reject the request for interim measures.

Summary of facts

10. On 3 September 2014, the Government issued the Preliminary Decision approving the expropriation of immovable property from the owners referred to in the tables attached to the Preliminary Decision. The Preliminary Decision namely reads:

“1. Approved the expropriation in the public interest of the immovable property of the owner and holder of interest, related to construction of the Brezovica tourist centre [...]

5. Against this decision or any of its part, the requesting subject, each person who is the owner or the holder of an interest over the immovable property referred to in this decision is entitled to appeal within thirty (30) calendar days with the competent court”.

11. The Applicant has not shown that it appealed the Preliminary Decision of the Government.

12. On 23 September 2015, the Government issued the Final Decision approving the expropriation of the immovable property as tabulated. The Final Decision reads:

“[...] 4. Integral part of this decision are the evaluating acts and tables in which are set out the amounts of compensation for those owners or holders of interest, property rights or legitimate interests to whom are affected by the expropriation process.

5. Against this decision the subjects have right to appeal within thirty (30) calendar days to the competent court, only to challenge the amount of compensation specified in this decision [...]”.

13. The Applicant has not shown that it appealed the Final Decision of the Government.

Applicant’s allegations

14. The Applicant claims that the challenged decisions of Government have violated its rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 46 [Protection of Property] and 54 [Judicial Protection of Rights] of the Constitution.
15. In general, the Applicant alleges that the Preliminary and Final Decisions of the Government are “illegal” considering that the requirements provided by

Article 4 of the Law on Expropriation have not been met and that the Government failed to explain how did it consider that such criteria were met.

16. The Applicant also claims that the challenged decisions “*present an obvious example of discrimination on the basis of ethnicity*” and that the “*final goal of expropriation is discrimination against Serbian nationals and companies*”. As a result, the Applicant alleges that the Government violated its right to equality guaranteed by Article 24 of the Constitution.
17. The Applicant further claims that the Government has failed to inform the Applicant and other owners about the intention to perform the expropriation. As a result, the Applicant alleges that the Government violated its right to fair and impartial trial guaranteed by Article 31 of the Constitution.
18. Moreover, the Applicant claims that it had “*no available legal remedies to challenge the legality and legitimacy of the expropriation*” because “*some of its assets [...] were not even included in the Preliminary Decision (although they are included in the Final Decision)*”. As a result, the Applicant alleges that the Government violated its right to legal remedies as guaranteed by Article 32 of the Constitution.
19. The Applicant still claims that, in connection with its right to legal remedies, the Government has also violated its right to judicial protection as protected by Article 54 of the Constitution by “*depriving its right to challenge the legitimacy of the subject expropriation*”.
20. Finally, the Applicant claims that the Government “*breached expropriation procedures, arbitrarily depriving the Submitter [Applicant] of his property.*” In that respect, the Applicant alleges that the Government failed to identify it “*as owner of the property subject to expropriation*”. As a result, the Applicant alleges that the Government violated its right to protection of property as guaranteed by Article 46 of the Constitution.
21. Furthermore, the Applicant requests the Court “*to render a Decision on Interim Measures and suspend any implementation of the Preliminary and Final Decisions, until the Constitutional Court renders a final decision on this referral*”.

Admissibility of the Referral

22. The Court recalls that the Applicant challenges the Preliminary Decision (No. 06/195, of 3 September 2014) and the Final Decision (No. 10/50, of 23 September 2015) of the Government which decided to expropriate a number of immovable properties for the purpose of constructing the Brezovica tourist centre.
23. The Applicant alleges that the Government has violated its rights to equality before the law; to protection from discrimination; to fair and impartial trial; to an effective legal remedy; to judicial protection of rights and to protection of property as guaranteed by the Constitution.

24. The Court first assesses whether the admissibility criteria as requested by the Constitution, the Law and Rules of Procedure have been met.
25. In this respect, the Court refers to paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

“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.”
26. The Court also refers to Article 47 [Individual Requests] which provides:

4. *“[...] The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law”.*
27. Furthermore, the Court refers to Rule 36 (1) b) of the Rules of Procedure which provides:

(1) *“The Court may consider a Referral if: (b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted [...]”.*
28. The Court notes that the Applicant has neither appealed the Preliminary Decision nor has it appealed the Final Decision of the Government, even though both of these decisions could have been appealed according to the law in force and the guidance on the right to appeal given by both Decisions.
29. More specifically, the Court notes that the Preliminary Decision could have been appealed by the Applicant in respect of the *“legitimacy of the proposed expropriation”*, which is mainly what the Applicant claims for the first time before the Constitutional Court. The Preliminary Decision provided a thirty (30) calendar days for the *“owners or holders of interests”* to challenge the whole decision or any part of it.
30. In this respect, the Court also notes that the Applicant, either as an owner or as a holder of interest, could have raised before the Supreme Court its allegations of a violation of its constitutional rights; but it has not availed from that legal remedy provided by law. Even if the Applicant was not recognized as *“owner”* of certain assets which it alleges to be its property, it could have raised these arguments as a *“holder of an interest”* considering that the law provided for such a possibility.
31. In fact, the Court recalls that the Applicant claims that some of its assets were part of the Final Decision without being part of the Preliminary Decision. For that reason, the Applicant complains that it was denied an effective legal remedy and judicial protection of rights.
32. Moreover, the Court notes that the Final Decision could also have been appealed by the Applicant. Similarly, the Final Decision provided another thirty (30) calendar days for appeals to be filed whilst limiting the scope of the appeal only to compensation with respect to the immovable property which

was to be expropriated. However, despite this limitation, the Applicant could have raised before the Supreme Court its allegation of a breach of his right to an effective legal remedy and judicial protection of rights and ensure that the principle of subsidiarity is respected by providing the Supreme Court with the opportunity to put right the alleged violations of the Constitution. The Applicant has not availed from this legal remedy either.

33. The Court notes that the facts described above show that, despite the opportunities presented by the law in force, the Applicant did not avail from any opportunity to challenge before the Supreme Court the legitimacy of the expropriation, either as an alleged owner or as an interest holder. The Applicant is raising these allegations for the first time before the Constitutional Court without having exhausted any of the available legal remedies.
34. The Court recalls that the Applicant has not shown that it appealed either the Preliminary or the Final Decisions of the Government. Despite this, the Applicant claims that its right to effective legal remedies and judicial protection of rights has been violated without even having tried to raise these alleged constitutional violations before the Supreme Court, which has exclusive jurisdiction to review expropriation procedures in cases where the Government is an expropriating authority.
35. The Court reiterates that it can only decide on the admissibility of a Referral, if the Applicant shows that it has exhausted all effective legal remedies available under applicable law.
36. The Court further reiterates that a remedy available under applicable law cannot be considered as ineffective without the Applicant even trying to exhaust it and see whether it produces any results.
37. The Court recalls that the principle of subsidiarity requires that the Applicant exhausts all procedural possibilities in the regular proceedings in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right.
38. The rationale for the exhaustion rule is to afford the authorities concerned, in this case the Supreme Court, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiarity character of the Constitution. (See Resolution on Inadmissibility: *AAB-RIINVEST University L.L.C., Prishtina vs. Government of the Republic of Kosovo*, KI 41/09, of 21 January 2010, and see *mutatis mutandis*, ECHR, *Selmouni vs. France*, no. 25803/94, Decision of 28 July 1999).
39. In fact, as a general rule, the Constitutional Court will only intervene where there are infringements of the interpretation of the Constitution or the laws do not comply with the Constitution, but only after exhaustion of all legal remedies provided by law.

40. Therefore, the Referral, according to Article 113 (7) of the Constitution, Article 47 (2) of the Law and Rule 36 (1) (b) of the Rules of Procedure, is inadmissible.

Request for Interim Measure

41. The Court recalls that the Applicant requested the Court to impose an interim measure, namely to suspend the legal effect of the challenged decisions, until the Constitutional Court renders a decision in respect of its Referral.
42. The Applicant alleges that the approval of the interim measure would be in public interest since *“illegal expropriation by the Government of Kosovo threatens the rule of law, ethnic minority rights, and economic and social stability.”*
43. In order for the Court to decide on an interim measure, pursuant to Rule 55 (4) a) and (5) of the Rules of Procedure, it is necessary that:
- “(4). [...] (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; [...] (5). If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application.”*
44. As emphasized above, the Applicant has not shown a *prima facie* case on the admissibility of the referral. Therefore, the request for interim measure is rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution; Article 47 of the Law; and Rule 36 (1) b), 55 (4) a) and (5), and 56 (3) and (5) of the Rules of Procedure, on 17 March 2016, unanimously

DECIDES

- I. TO DECLARE the Referral 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 (4) of the Law;
- V. TO DECLARE this Decision effective immediately.

Judge Rapporteur



Almiro Rodrigues

President of the Constitutional Court



Arta Rama-Hajrizi