



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

Prishtina, on 31 August 2015
Ref. No.: RK 836/15

RESOLUTION ON INADMISSIBILITY

in

Case No. KI18/15

Applicant

“Iming” D.O.O.
Rrustem Zogaj, owner

**Constitutional Review of Decision AC-I-14-0357-A0001 of the Appellate
Panel of the Special Chamber of the Supreme Court of Kosovo on
Privatization Agency of Kosovo Related Matters,
of 5 February 2015**

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 Applicant is the company “Iming” D.O.O., with headquarters in Stobec of the Republic of Croatia, owned by Mr. Rrustem Zogaj. The Applicant is represented by Mr. Sahit Bibaj and Mr. Gafurr Elshani, lawyers in Prishtina.

Challenged Decision

2. The Applicant challenges Decision AC-I-14-0357-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: Appellate Panel of SCSC), of 5 February 2015, by which Decision C-I-14-0022, of the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: Specialized Panel of SCSC), of 19 November 2014 on rejection of Applicant's proposal for imposing preliminary injunction was upheld.
3. The challenged decision was served on Applicant on 9 February 2015.

Subject Matter

4. The subject matter is the constitutional review of the abovementioned Decision of the Appellate Panel of SCSC, by which the Applicant's appeal against the Decision of the Specialized Panel of SCSC was rejected as ungrounded.
5. The Specialized Panel of SCSC rejected the Applicant's proposal for issuing preliminary injunction, by which the Applicant requested temporary suspension of the decisions of the Board of Directors of the Privatization Agency of Kosovo on share call and placing New Company MIM "Golesh" under administration of the Privatization Agency of Kosovo (hereinafter: PAK).
6. The Applicant requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose Interim Measure, namely "*PROHIBITION OF EXECUTION OF DECISIONS OF THE PAK, with Ref. No. BD-69/35, of 21 August 2014, Decision BD-69/36, of the same date and also Decisions C-I-14-0022, of the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo, of 19 November 2014 and Decision No. AC-I-14-0357-A0001, of the Appellate Panel of the same Chamber, of 05 February 2015, until the final decision of the Court.*"

Legal Basis

7. The Referral is based on Articles 113.7 and 21.4 of the Constitution of the Republic of Kosovo (hereinafter: 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 54, 55 and 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

8. On 19 February 2015, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

9. On 12 March 2015, the President of the Court by Decision GJR. KI18/15, appointed Judge Arta Rama-Hajrizi as Judge Rapporteur. On the same date, the President, by Decision KSH. KI18/15, appointed the Review Panel composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues and Enver Hasani.
10. On 30 March 2015, the Court informed the Applicant about the registration of the Referral. On the same date, the Court sent a copy of the Referral to the SCSC and PAK.
11. On 26 June 2015, the President of the Court by Decision GJR. KI18/15, appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date, the President of the Court, by Decision KSH. KI18/15 appointed 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.
12. On 2 July 2015, after having considered the Report of the Judge Rapporteur, the Review Panel recommended to the Court the inadmissibility of the Referral.

Summary of facts

13. On 11 December 2007, after the completion of the privatization process through the Special Spin-off, the Kosovo Trust Agency (hereinafter: KTA), concluded a contract with the Applicant to sell the entire share capital of New Company MIM "Golesh" LLC (hereinafter: MIM "Golesh").
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 and employment of a certain number of employees within a certain time limit. Non-fulfillment of these commitments may have resulted in withdrawal of shares.
15. According to the case file, it follows that the PAK, as the legal successor of the KTA, in 2009, due to non-fulfillment of commitments defined in the commitment agreement within the certain time limit, had given an extension of deadline for 2 (two) years, the term that would have expired in 2011.
16. In 2012, the Board of Directors of PAK, with a justification that the Applicant did not act in full compliance with investment commitments, decided to withdraw the shares purchased by the Applicant, a decision which was subsequently suspended giving the Applicant another period of 41 months, to fulfill the commitments. This term would have expired in October 2015.

17. However, before the expiration of the aforementioned deadline, namely on 31 August 2014, the Board of Directors of PAK (Decision no. BD-69/35), with justification that the Applicant did not act in full compliance with the commitments defined in the commitment agreement, decided to execute the Decision of the Board of Directors of PAK, of 16 December 2011, for the withdrawal of shares of NewCo MIM "Golesh" LLC.
18. On the same date, the Board of Directors of PAK (Decision no. BD-69/36) decided to place NewCo MIM "Golesh" LLC under the administration of the PAK.
19. On 23 October 2014, Acting Deputy Managing Director of PAK rendered the decision to implement the two decisions of the PAK Board of Directors of 31 August 2014.
20. On 30 October 2014, the Applicant submitted to the Specialized Panel of SCSC, the proposal for preliminary injunction, namely the temporary suspension of the decisions of the PAK Board of Directors, of 31 August 2014.
21. On 3 November 2014, the Applicant also filed a claim with the SCSC for the annulment of the abovementioned decisions of the KPA Board of Directors, of 31 August 2014. Based on the case file, the Applicant's claim is still pending in the SCSC.
22. On 19 November 2014, the Specialized Panel of SCSC (Decision, CI-14-0022) rejected the Applicant's proposal for preliminary injunction as ungrounded.
23. The Specialized Panel of SCSC in its Decision assessed that the Applicant *"failed to determine that there are sufficient reasons to suspend the action of the PAK Board of Directors, which is challenged by the Applicant in its claim."*
24. The Specialized Panel of SCSC further held that, *"Based on the assessment of indisputable allegations of the claimant and with the purpose of deciding the request for preliminary injunction, by leaving open any assessment on the main issue, the court concludes that the PAK action to withdraw the claimant's shares in the company "Golesh" seems to be lawful, causing no harm at all, so there is no need to suspend it."*
25. As a result, the Specialized Panel concluded that the entry into force of the decisions of the PAK Board of Directors *"does not cause any damage that needs to be compensated later"*.
26. On 25 November 2014, against the Decision of the Specialized Panel of SCSC on rejection of the preliminary injunction, the Applicant filed an appeal with the Appellate Panel of the SCSC.

27. In its appeal, the Applicant requested the annulment of the Decision of the Specialized Panel and the Appellate Panel to hold that the decisions of the PAK Board of Directors, of 31 August 2014 are “*unlawful and taken in violation of legal procedures in force.*” The Applicant further alleged that the decision making by the PAK Board of Directors was not conducted according to legal provisions in force.
28. On 5 February 2015, the Appellate Panel of the SCSC (Decision, AC-I-14-0357-A0001) rejected the Applicant's appeal as ungrounded and upheld the Decision of the Specialized Panel.
29. In its Decision, the Appellate Panel of the SCSC held that the Applicant's appeal allegations that the decisions of the PAK Board of Directors should be taken by qualified majority of votes, with at least five (5) members of the Board, are ungrounded.
30. The Appellate Panel of the SCSC further found that the assessment of the Specialized Panel that “*no damage will be caused to the buyer*” is in accordance with the legal provisions in force, reasoning that the financial damage can always be compensated. Accordingly, the Appellate Panel concluded that:

“Based on what was reasoned above, the Appellate Panel finds that the claimant's claim is ungrounded, therefore the decision of the Specialized Panel is upheld as fair and based on law.

This Decision of the Appellate Panel concerns only an interim measure and there can be no prejudice to the final adjudication of the claim. ”
31. Based on the case file, it follows that the claim filed by the Applicant is still pending in the Specialized Panel of SCSC.

Applicant's Allegations

32. In its Referral, the Applicant alleges that the Decisions of the Specialized Panel and of the Appellate Panel of the SCSC have violated its rights guaranteed by Article 3 [Equality Before the Law], Article 24 [Equality Before the Law], paragraph 2, Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution, as well as the rights guaranteed by Article 6 [Right to a fair trial] of the European Convention of Human Rights (hereinafter: the ECHR) and Article 10 of the Universal Declaration of Human Rights (hereinafter: the UDHR).
33. The Applicant alleges that the Board of Directors of PAK, the Specialized Panel and the Appellate Panel of SCSC, by challenged decisions have seriously violated the law, because the Decision of the Board of Directors of PAK on share call option, of

31 August 2014, was rendered before the expiry of the deadline for the fulfillment of commitments, which was extended by the Board of Directors until October 2015. The Applicant, *inter alia*, states that all actions of the Board of Directors are related to the fact that “*the KTA-PAK did not give the Applicant the consent to mortgage the immovable property in order to ensure the capital investments, which means that the right won through privatization was limited by the KTA-PAK [...]*”.

34. Regarding the Applicant's allegation for violation of Article 6 of the ECHR, the Applicant claims that the parties to the proceedings have not been treated equally. The Applicant further adds that the Appellate Panel of the SCSC has found that the decision making in this case should be conducted by qualified majority, and that in the present case, one decision is taken by four votes for and one abstention, while the other decision was taken by five affirmative votes.
35. In this regard, the Applicant addresses the Court with the request to annul the challenged decisions of the Specialized Panel and of the Appellate Panel of SCSC and “*to remand the case for retrial regarding the preliminary injunction so that the appellant [Applicant] to return immediately to the assets purchased which have been taken under control of the PAK [...]*.”
36. Finally, the Applicant requests the Court to impose Interim Measure, namely to suspend execution of the Decision of the Board of Directors of PAK, of 31 August 2014, and decisions of Specialized Panel and of Appellate Panel of SCSC, until final decision is rendered by the SCSC.

Assessment of the Admissibility of the Referral

37. In order to be able to adjudicate the Applicant's Referral, the Court needs to first examine whether the Applicant has met admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure.
38. The Court refers to Article 113.7 of the Constitution that 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.”

Applicant's allegations regarding the Decision of the PAK Board of Directors

39. As mentioned above, the Applicant alleges that the Decision of the PAK Board of Directors on the share call option, of 31 August 2014, was rendered before the

deadline for fulfillment of commitments, and that the decision making in the PAK Board of Directors was conducted contrary to the provisions of the Law on PAK.

40. The Court notes that the Applicant after filing the proposal for preliminary injunction, it also filed a claim with the SCSC for the annulment of the aforementioned decisions of the PAK Board of Directors, of 31 August 2014. The Applicant's claim is still pending before the SCSC Specialized Panel.
41. In this regard, the Court refers to Article 47.2 of the Law, which provides: "*The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.*"
42. In this case, the Court also takes into account Rule 36 (1), (b) of the Rules of Procedure:
 - (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,

[...]
43. Taking into account the fact that the Applicant's claim is still pending before the SCSC, the Court considers that the Applicant can also address its claims regarding the manner of decision making by the PAK Board of Directors during the proceedings of review of its claim in the SCSC. Based on this, the Court notes that these allegations are premature, because the regular courts should be given a possibility, respectively the SCSC, to complete the proceedings related to the Applicant's claim that are ongoing.
44. The rationale for the exhaustion of legal remedies is to afford, in this case the regular courts, the opportunity to remedy the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order shall provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see, Case KI41/09, Applicant: *AAB-RIINVEST L.L.C.*, Constitutional Court, Resolution on Inadmissibility of 21 January 2010 and, see, *Selmouni v. France*, no. 25803/94, ECHR, Decision of 28 July 1999).
45. 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 fundamental rights (See Case

KI07/09, Applicants: *Demë Kurbogaj and Besnik Kurbogaj*, Constitutional Court, Resolution on Inadmissibility of 19 May 2010).

46. Accordingly, the Court cannot assess the alleged constitutional violations, without providing the possibility to regular courts, namely the SCSC, to complete the proceedings related to the Applicant's claim that are pending and to correct the alleged violations.
47. Therefore, the Court concludes that the Applicant's allegations regarding the content and the manner of decision making by the Board of Directors of PAK, are premature.

Allegations regarding decisions of the SCSC on rejection of the proposal for preliminary injunction

48. As mentioned above, the Applicant challenges the decisions of the Specialized Panel and of the Appellate Panel of the SCSC regarding its proposal for preliminary injunction, claiming violation of its rights under Article 3 [Equality Before the Law], Article 24 [Equality Before the Law], paragraph 2, Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution, as well as its rights guaranteed by Article 6 [Right to a fair trial] of the ECHR and Article 10 of the UDHR.
49. In this regard, the Court takes into account Article 48 of the Law, which states:

“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 a public authority is subject to challenge.”

50. 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:

[...]

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

51. The Court notes that the Appellate Panel of the SCSC in its decision has found that the assessment of the Specialized Panel that no damage will be caused to the Applicant, is in accordance with the legal provisions in force, reasoning that a financial damage can always be compensated. The Appellate Panel, without prejudice to the decision on the Applicant's claim with the SCSC, concluded that the Applicant's appeal regarding its proposal for preliminary injunction is

ungrounded, upholding the decision of the Specialized Panel as fair and based on the law.

52. The Court considers that the mere fact that the Applicant is not satisfied with the outcome of the decisions of the regular courts is not sufficient for the Applicant to build a claim of a constitutional violation. (See *mutatis mutandis* case *Mezőtúr-Tiszazugi Vízgazdálkodási Társulat against Hungary*, No. 5503/02, ECHR, Judgment of 26 July 2005, paragraph 21). When such violations of the Constitution are alleged, the Applicant must provide a reasoned claim and a compelling argument. (See case KI198/13, Applicant: *Privatisation Agency of Kosovo*, Constitutional Court, Resolution on inadmissibility, of 13 March 2014).
53. In this regard, the Court reiterates that it is not its task under the Constitution to deal with errors of fact or law (legality) allegedly committed by the Supreme Court, unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). Therefore, the Court cannot take the role of the regular courts. It is the role of the regular courts 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, Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).
54. Moreover, as mentioned above, the Court notes that the reasoning given in the Decision of the Appellate Panel of the SCSC on rejection of the Applicant's proposal for preliminary injunction is clear and, after the review of the proceedings in their entirety, the Court has found that the completed proceedings before the Specialized Panel and the Appellate Panel of SCSC regarding preliminary injunction have not been unfair or arbitrary (See case *Shub against Lithuania*, no. 17064/06, ECHR, Decision of 30 June 2009).
55. For the foregoing reasons, the Court concludes that the Applicant has not sufficiently substantiated its allegation.
56. Therefore, the Applicant's request with respect to its claims regarding the rejection of the Applicant's proposal for preliminary injunction is manifestly ill-founded.
57. In sum, based on the reasoning above, the Court concludes that the Applicant's Referral:
 - A. In the part of the Applicant's Referral that relates to his allegations regarding the content and the manner of decision making by the PAK Board of Directors is inadmissible as premature.

- B. The part of the Applicant's Referral that relates to his allegation regarding the rejection of the Applicant's proposal for a preliminary injunction is inadmissible as manifestly ill-founded, because it has not substantiated its allegations of violation of the principle of equality, protection of property and its right to fair and impartial trial, as invoked by the Applicant.

Request for Interim Measure

58. The Applicant requests the Court to impose Interim Measure, namely to suspend the execution of the decisions of the PAK Board of Directors, of 31 August 2014, and decisions of Specialized Panel of SCSC (Decision, CI-14-0022, of 19 November 2014) regarding the rejection of the Applicant's proposal for preliminary injunction and of the Appellate Panel (Decision, AC-I-14-0357-A0001, of 5 February 2015).
59. The Applicant states that the Interim Measure is necessary: *"[...] because the possession of assets and machinery invested in millions was made impossible, hundred employees were fired from their work, interests of the foreign investor, guaranteed by the Law on Foreign Investments in Kosovo, were damaged, the Applicant considers that it has been damaged and also the public interest is damaged by massive dismissals of employees from work, for which the Applicant invested also in their specific qualification beside the payment of salaries, and there is also damage of the assets and property which has remained without due supervision and care."*
60. In addition, in order that the Court imposes interim measure, pursuant to Rule 55 (4) 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"*
61. As concluded above, the Referral is inadmissible because the Applicant's allegations regarding the manner of decision making by the PAK Board Directors are premature, while its allegations with regards to the decisions of the Specialized Panel and Appellate Panel regarding the preliminary injunction are manifestly ill-founded.
62. Furthermore, the Court reiterates that a request for the imposition of the Interim Measure should 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 Case KI187/13, Applicant *N. Jovanović*, the Constitutional Court, Judgement of 16 April 2014, paragraph 74).

63. Therefore, the Applicant's request to impose Interim Measure is to be rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 27, 47.2 and 48 of the Law and Rules 36 (1) (b) and (d), 36 (2) (b) and (d), 55 (4) and 56 (2) and (3) of the Rules of Procedure, on 31 August 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. This Decision is effective immediately.

Judge Rapporteur

Ivan Čukalović



President of the Constitutional Court

Arta Rama-Hajrizi