



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, 30 October 2014
Ref. no.: RK725/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI217/13

Applicant

L.L.C. "H.P.G"

Constitutional Review of the Decision no. AC-I-13-0169 of the Special Chamber of the Supreme Court of Kosovo dated 10 October 2013

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

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

Applicant

1. The Referral was submitted by the Limited Liability Company (L.L.C.) "H.P.G" (hereinafter, the Applicant), represented by Ms. Iliriana Osmani Serreqi and Mr. Gani Tigani, lawyers from Prishtina.

Challenged decision

2. The Applicant challenges Decision AC-I-13-0169 of the Special Chamber of the Supreme Court of Kosovo (hereinafter, the SCSC) of 10 October 2013, which was served to him on 11 October 2013.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision which allegedly "*is unconstitutional and as such should be annulled*".

Legal basis

4. 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 the 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

5. The Applicant submitted the referral on 27 November 2013.
6. On 3 December 2013 the President of the Constitutional Court, with Decision No. GJR. KI217/13, appointed Judge Arta Rama-Hajrizi as Judge Rapporteur. On the same date the President of the Constitutional Court, with Decision No. KSH. KI217/13, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Kadri Kryeziu.
7. On 6 February 2014 the SCSC was notified of the referral.
8. On 26 May 2014 the SCSC submitted their comments.
9. On 23 September 2014, after having considered the report of Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. The Applicant participated in a tender announced by the Privatization Agency of Kosovo (hereinafter, PAK) for the privatization of the company "Bankos LLC" in Peja. The applicant was the highest bidder for the mentioned tender (Letter of PAK, ref. no. 641 dated 24 September 2012).
11. On 29 March 2013 PAK notified the Applicant for the annulment of the tender because "*the offer was too low*".
12. On 17 April 2013 the Applicant submitted a complaint to PAK against the decision of the Board to annul the tender.

13. On 18 June 2013 the Applicant filed a claim before the SCSC requesting the annulment of the decision of PAK and requested that that the SCSC issue a preliminary injunction in order prohibit the reopening of the tender for the mentioned company until the final decision.
14. On 31 July 2013 the Specialized Panel of the SCSC (Decision C-I-13-0015) rejected as unfounded the request for imposing a preliminary injunction.
15. The SCSC held:

“The Court’s opinion is that on this matter, the conditions provided by Article 55.1 of the Annex of Law no.04/L-033 on SCSCCK, for issuance of preliminary injunction, were not met, because the claimant didn’t prove that he will suffer direct and irreparable damage, if the Provisional measure is not imposed.

In fact, no proof exists, that direct damage will occur because we can assume from the circumstances that the tender will not be opened again in the near future. Concerning this matter, no proof exists, that direct and irreparable damage cannot be compensated rationally by monetary compensation”.
16. On 28 August 2013 the Applicant filed an appeal against the Decision of the SCSC dated 31 July 2012 due to erroneous application of the substantive law and erroneous incomplete determination of the factual situation.
17. On 10 October 2013 the Appellate Panel of the SCSC (Decision AC-I-13-0169) rejected as ungrounded the Appeal submitted by the Applicant and confirmed the Decision of the Trial Panel of SCSC C-I-13-0015 dated 31 July 2013.
18. The Appellate Panel of the SCSC held that:

“The reasoning of the Trial Panel cannot be considered as sufficient grounds for a Ruling. In fact the Panel supports its Ruling on the presumption which is not sufficient as grounds for a Ruling. Apart from it, the Specialized Panel didn’t specify which circumstances would support this presumption. Therefore, the reasoning is invalid. However, this will not impact the rendered Ruling, because the Panel of Appeal assesses that however, the appeal must be rejected on these grounds. On this matter, the appellant, on whom falls the weight of the evidence, in terms of Article 55.1 of the Annex, didn’t provide reliable evidence that the alleged right, which he seeks, exists. The appellant didn’t provide proof that the outcome of the tender is mandatory for the Agency and that it must lead to signing the sales contract. Quite the opposite, the rules of tender allow the PAK Board to annul the tender any time before signing the contract. Article 17.1 of the Rules of Tender provides that: “The Board according to its choosing may postpone or annul the Tender any time or for any reason”. Therefore, announcement as the provisional winner is not a guarantee that the Agency will sign the sales contract. For withdrawing the tender, PAK referred to this provision of the Rules of Tender”.

19. On 26 May 2014, the SCSC notified the Court that the SCSC has acted in accordance with Article 55.2 of the Annex of the Law on Special Chambers which states that *“The Special Chamber may decide on an application for a preliminary injunctive relief without a hearing after the other party has had an opportunity to file opposing arguments in writing. Where exigent circumstances exist requiring the Special Chamber to act on the application immediately, the Special Chamber may decide on the application for a preliminary injunction without serving the application to the other party. Preliminary injunctions shall only be granted for a limited period of time and may be extended upon application”*.
20. The SCSC further informed the Court that it has only decided in relation to the preliminary injunction and has not yet decided on the merits of the case.

Applicants’ allegations

21. The Applicant alleges that his right to a fair trial has been violated due to the actions and omissions of the SCSC because the Applicant *“was never given the opportunity to respond to the objections of the respondent”*.
22. Furthermore, the Applicant alleges that *“that the respondent filed a Response to the Claimant’s request for the proposal of issuing a preliminary injunction, while the claimant was not given the opportunity of say on the objections of the respondent. While the claimant’s claim was delivered to the respondent in order to have his say, declaration of the claimant from the Response to the Referral for a preliminary Injunction were not made know and not delivered to the claimant”*.
23. The Applicant appears to conclude that his right to fair trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, have been violated by the SCSC.

Assessment of the admissibility

24. First of all, the Court examines whether the Applicant has fulfilled the admissibility requirements.
25. In this respect the Court takes into account Rule 36 (1) c) and (2) b) of the Rules of Procedure, which foresees:
 - (1) *The Court may only deal with Referrals if: (c) the Referral is not manifestly ill-founded.*
 - (2) *The Court shall reject 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.*
26. In addition, the Court notes that the Applicant has not substantiated a claim on constitutional grounds and has not provided evidence proving that their fundamental rights and freedoms have been violated by the regular courts.

27. The Court can only consider whether the evidence has been presented in such a manner that the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see among other authorities, Report of the Eur. Commission of Human Rights in the case *Edwards v. United Kingdom*, App. No. 13071/87, adopted on 10 July 1991).
28. In addition, in respect to the Applicants allegations relating to the possibility to respond to the respondent's reply it must be noted that according to ECtHR, it "[...] has in the past found that the non-communication of written observations or documents in the proceedings and the impossibility for the applicant to comment on them did not constitute a violation of the right to a fair hearing. In its reasoning, the Court explained that, in the particular cases in question, granting to the applicant such rights and opportunities would have had no effect on the outcome of the proceedings as the legal approach adopted was not open to discussion." (See case *Hudakova and others v. Slovakia*, Application no. 23083/05, Judgment of 27 April 2010).
29. Thus, the Court notes that the Applicant themselves submitted the request for preliminary injunction to the SCSC which the SCSC gave to PAK to submit their observations. The SCSC on its discretion and based on the Applicant's request and the observations of PAK decided to reject the request for preliminary injunction. Furthermore, the Applicant filed an appeal to the Appellate Panel of the SCSC whereby they were given the opportunity to submit their observations in respect to this allegation.
30. The Court notes that the SCSC reasoned its decision to reject the request for preliminary injunction and thus the Court cannot conclude that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, *Shub v. Lithuania*, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).
31. Thus, this Court is not to act as a court of fourth instance, when considering the decisions taken by the regular courts. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, *García Ruiz v. Spain [GC]*, no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).
32. Therefore, pursuant to Rule 36 (1) c) of the Rules of Procedure, the Referral is manifestly ill-founded and thus it is inadmissible.


FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Rules 36 (1) c) and 56 (2) of the Rules of Procedure, on 23 September 2014, unanimously

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this decision in the Official Gazette, in accordance with Article 20 (4) of the Law;
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur


Arta Rama-Hajrizi



President of the Constitutional Court


Prof. Dr. Enver Hasani