



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

Pristine, 27 January 2012
No. ref.: 190/12

RESOLUTION ON INADMISSIBILITY

in

Case No.KI 90,91,92,93,94 and 95/10,
Joint Decision UR 90-10-bk/10 dated 8 October 2010

Applicants

All the shareholders of the Holding “Jatex-Conitex” JSC, Holding “Jatex-Modatex” JSC, Holding Jatex-Jatex Commerce JSC, Holding Corporacy ”Jatex” JSC, Holding “Jatex-Junitex” JSC, Holding”Jatex-Tricotex” JSC

Represented by lawyers: Mr. Gazmend Nushi and Mr.Ahmet Hasolli

Constitutional Review of the Decision of the Kosovo Agency for Privatization on privatization of the new Enterprise Jatex - industrial complex LLC, during the 45 A wave of privatization

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicants

1. Applicants are the shareholders of the Holding Corporacy “Jatex”, with its units: holding “Jatex-Conitex” JSC, Holding ‘Jatex-Modatex” JSC, Holding Jatex-Jatex Commerce JSC, Holding “Jatex-Junitex” JSC, Holding ”Jatex-Tricotex” JSC based in Gjakova and Junik, represented by authorized lawyers Mr. Gazmend Zhushi and Mr. Ahmet Hasolli.

Challenged Decisions

2. Challenged decisions at the Constitutional Court are:

Decision of KAP on approval of the recommendations for treatment of enterprises; "Emin Duraku" "Jatex" and "Deva" as socially owned enterprises, dated 29 April 2010, and

Decision of KAP on announcing the 45 A wave of privatization to privatize the new Jatex Enterprise - industrial complex LLC.

Subject Matter

3. Decision of the KAP on announcing the 45 A wave of privatization to privatize the new Jatex Enterprise - industrial complex LLC, which according to the representatives of the shareholders has been taken without legal basis and by such an action the KAP has violated Articles 46.1 and 46.3 of the Constitution of Kosovo (the right to own property) in conjunction with Article 1 of the Protocol of the European Convention on Human Rights.

Legal Basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereafter: the "Constitution"), Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2009 (hereafter: 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 Court

5. On 29 September 2010 representatives of the Applicants, lawyers Mr. Gazmend Nushi and Mr. Ahmet Hasolli submitted the Referral to the Constitutional Court describing as illegal decisions of KAP, dated 29 April 2010, on approval of the recommendations for treatment of "Emin Duraku", "Jatex" and "Deva" enterprises as SOE, as well as the decision of the KAP on announcing the 45 A wave of privatization to privatize the new Jatex Enterprise – industrial complex LLC.
6. On 9 November 2010 the Constitutional Court notified the parties on the case registration and asked for their eventual opinion regarding the Referral.
7. On 23 November 2010 and on 10 March 2011 the Constitutional Court has received in written the answer and comments from the Kosovo Agency for Privatization, regarding the Referral.
8. On 12 May 2011 after reviewing the report of Judge Rapporteur Kadri Kryeziu, the Review Panel composed of Judges: Snezhana Botusharova (presiding), Robert Carolan and Altay Suroy recommended to the full Court the inadmissibility of the Referral.

Summary of the facts

9. According to the applicants of the six former BOAL, now claimants, in 1990 in compliance to the legislation applicable at that time, they had separated from the Industrial Combine "Emin Duraku" and been transformed into joint stock companies. Such transformation, according to them, had been done in compliance with the Law on Business Organizations (Offi. Gazz. of SFRY no. 77/88, 40/89, 46/90).

10. On 16 August 1991 taking into account the fact that many stages of their production were related to each other and the fact that all the companies except “Junitex” were located at the same complex in Gjakova, they took a DECISION on establishing HOLDING CORPORACY “JATEX” JSC.
11. With this decision the companies decided that they carry 51% of their shares to the ‘HOLDING CORPORACY’ and keep 49 % for themselves.
12. On 22 November 1991 the District Commercial Court in Gjakova registered Holding Corporacy “Jatex” by Decision No. Fi.2917/91, the District Commercial Court in Gjakova also registered the other joint enterprises, which have filed their request with the Constitutional Court.
13. On 24 December 1992 Holding took the Decision 06-194/2 on emanation of internal shares in APOENA, and each shareholder was provided with these action sheets.
14. In such a form of structuring the Holding Corporacy “Jatex” and other joint enterprises have functioned till 1999.
15. Acting in compliance with the Judgment of the District Commercial Court in Prishtina VII.C 29/06, Ministry of Trade and Industry – Office for Registration of Business, Enterprises and Trade Name in Kosovo, registered Holding “Jatex” and all other companies, which now have submitted the Referral to the Constitutional Court, by qualifying them as **“other enterprises under the jurisdiction of KTA”**.
16. On 22 April 2010 Kosovo Agency for Privatization, issued a press release through which informs the public about the decision of the KAP board, that enterprises “Emin Duraku”, ”Jatex” and “Deva” from Gjakova shall be treated as socially owned enterprises.
17. On 20 May 2010 KAP had sent a special notice in writing to “Jatex” Enterprise regarding the Decision of the KAP Board on qualifying the “Emin Duraku” Company in Gjakova, part of which before the separation was “Jatex”, as a 100% socially owned company, putting it under the jurisdiction of the KAP, and at the same time informed them on legal basis upon which the decision was made.
18. On 30 August 2010 KAP had sent a notice on refusing the appeal of “Holding Corporacy Jatex” and informing them that the KAP will continue to administer “Jatex” Company as a social enterprise, and instructed them that this company can appeal with Special Chamber of the Supreme Court.
19. On 7 September 2010 the KAP has announced the 45A wave of privatization, publishing the new enterprises: “Jatex fabrika e re”LLC and “Jatex Kompleksi Industrial”, part of which as to KAP’s additional clarification are Holding Corporacy “Jatex”, holding “Jatex-Conitex” JSC, Holding “Jatex-Modatex” JSC, Holding jatex-jatex Commerce JSC, Holding “Jatex-Junitex” JSC and Holding ”Jatex-Tricotex” JSC.
20. On 21 October 2010 KAP, rendered a Resolution **SCC- 10 -0215** with which they approved the request of the plaintiff and ENFORSED **interim measures** by STOPPING the sale of the announced assets for privatization of the new enterprise ”Jatex Fabrika e Re” LLC and new factory “Jatex Kompleksi Industrial” LLC until the final decision on solving the suit with this Court.

21. From the submitted documentation of the case file as well as from the answers of the parties involved in this case, it's observed that the proceedings with the Special Chamber of the Supreme Court are still pending.

Applicants' allegations

22. Applicants claim that as shareholders the decision of the KAP has violated their rights to property guaranteed by the Constitution of the Republic of Kosovo, more precisely according to them there was violation of Article 46 paragraph 1 and 3 of the Constitution.
23. Applicants of the Referral also complain that the Kosovo Agency for Privatization did not consider the legal status of the Holding "Jatex-Corporacy" JSC enterprise and other abovementioned units, defined by the legislation applicable during 1991 and continuous operation of these enterprises with the same status until 1999, when the same arbitrarily decided on 29 April 2010 to define the new legal status of these enterprises qualifying them and their assets as 100% socially owned, and unfairly put them under KAP's management. With this decision, which according to them is unconstitutional, without their approval they have been deprived of their ownership rights on stocks acquired through an absolutely legal manner, according to them.
24. Applicants have also stated that even though they have requested for interim measures from the Special Chamber of the Supreme Court they do not recognize the jurisdiction of this court, therefore they request from the Constitutional Court to render a decision based on merits of the case.

Comments of the Public Authority

25. On 23 November 2010 the Kosovo Agency for Privatization sent a written reply regarding the case KI 95/10, stating that "Applicants have filed their complaint with the Special Chamber of the Supreme Court as well, case file no.SCC-10 -0215 and that this Chamber on 21 October 2010 has approved the interim measures through Judgment no. SCC- 10-0215 by which the KAP is not allowed to sell the announced assets for privatization until the final decision on this claim is made".
26. Acting in accordance to the request of the Constitutional Court for additional clarification, KAP on 10 March 2001 has submitted additional reply regarding the claim through which they explained that: all joint stock companies which have submitted requests to the Constitutional Court are assets of the Enterprise "Jatex Fabrika e re" and the new Enterprise "Jatex Kompleksi Industrial" JSC, which have been tendered in the 45A wave of privatization.

Admissibility of the Referral

27. In order to be able to judge on Applicants' Referral, the Court preliminarily assesses whether the party meets the requirements of admissibility and in that regard refers to the Article 113.7 of the Constitution which states:

"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".

In conjunction with Article 21.4 of the Constitution defining that:

“Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.”

28. Having reviewed all the submitted documentation of the case file by the parties, the Court in an uncontested manner finds that the parties which have submitted the Referral to the Constitutional Court also have filed their suit with the Special Chamber of the Supreme Court, which Court did not issue a final decision yet and the proceedings are still pending, what implies the fact that the parties have not exhausted all the legal remedies provided by law and in these conditions did not meet the criteria for admissibility of the Referral.
29. The Court cannot accept as reasonable the request of Applicants' for not recognizing the jurisdiction of the Special Chamber of the Supreme Court, when by UNMIK Regulation **2002/13** (of 13 June 2002) Article 1.1 clearly defines: by this establishes the **Special Chamber of the Supreme Court of Kosovo** on Kosovo Trust Agency Related Matters (hereafter: “Special Chamber”).
30. Constitutional Court also realizes the fact that it's exactly this “legal decision” of this Special Chamber of the Supreme Court (Resolution on interim measures No.SCC- 10-0215) which suspended the privatization of enterprises these Applicants have interest on, and this resolution was taken based on their representatives Referral, therefore, the Constitutional Court cannot render any decision as long as the proceedings with the Supreme Court are pending.
31. The Court wishes to emphasize that the justification for the rule of exhaustion of remedies is made in order to provide the concerned authorities, including the courts, the opportunity to prevent or remedy the alleged violation of the Constitution. This rule is based on the assumption that the legal order of Kosovo will provide efficient means of law for violation of constitutional rights (see, mutatis mutandis, ECHR, Selmouni v. France no. 25803/94, Decision of 28 July 1999).
32. Similar reasoning the Court applied during the previous reviews of Referrals for cases: KI 55/10 Hamide Osaj requesting the Constitutional Review of the Judgement of the Supreme Court of Kosovo, Pkl. No. 43/2010, dated 4 June 2010 ; Case No. KI 20/10 Muhamet Bucaliu against the Decision of the State Prosecutor KMLC.No.09/10 od 24 February 2010(Decision of Constitutional Court , dated 15 October 2010)
33. In these circumstances, the Referral is **inadmissible** because the parties **did not exhaust all legal remedies** before addressing to the **Constitutional** Court and the Applicants did not meet the criteria of the admissibility, therefore

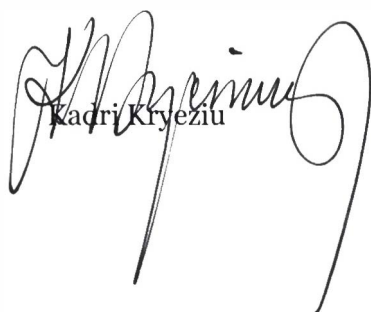
FOR THESE REASONS

Pursuant Article 49 of the Law on the Constitutional Court, and Rule 36 paragraph 1 (a) of the Rules of Procedure, the Constitutional Court on the session held on 12 May 2011 unanimously:

DECIDED

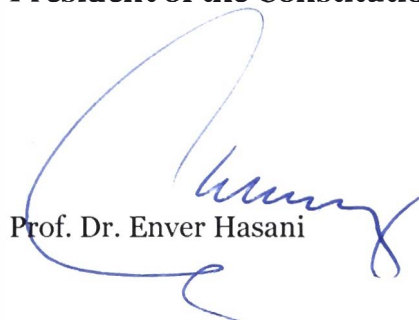
- I. TO REJECT the Referral as inadmissible, given that Applicants did not exhaust all the legal remedies provided by law, before addressing the Constitutional Court;
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court; and
- III. This Decision is effective immediately.

Judge Rapporteur



Kadri Kryeziu

President of the Constitutional Court



Prof. Dr. Enver Hasani