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

Prishtina, 29 December 2016
Ref. No.:RK 1029/16

# RESOLUTION ON INADMISSIBILITY

in

**Case No. KI91/16**

Applicants

**Belkis Abazi**
**Fahrije Nuhiu**
**Bedrije Vërtopi**
**Ilaz Bullatovci**
**Atije Zeqiri**
**Artan Shabani**
**Dardane Xërxa**

**Constitutional review of Judgment AC-I-13-0264, of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 21 January 2016**

**CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

Composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
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 submitted by Belkis Abazi, Fahrije Nuhiu, Bedrije Vërtopi, Ilaz Bullatovci, Atije Zeqiri, Artan Shabani and Dardane Xërxa (hereinafter, the Applicants), who are represented by Mr. Florin Vërtopi, a lawyer in Prishtina.

## Challenged decision

2. The Applicants challenge Judgment AC-I-13-0264 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter, the Appellate Panel), of 21 January 2016, which was served on the Applicants on 26 February 2016.

## Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly violated the Applicants' rights as guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), and Article 6 [Right to a fair trial] and Article 13 [Right to an effective remedy] of the European Convention on Human Rights (hereinafter, ECHR).

4. The Applicants also request the Constitutional Court of the Republic of Kosovo (hereinafter, the Court) to impose an interim measure, respectively to prohibit the execution of payment of the amount which N. I. should receive as a result of 20% of proceeds generated by the privatization of the Social Owned Enterprise Drithnaja (hereinafter, Drithnaja).

5. The Applicants request the Court to hold a hearing regarding their case.

## Legal basis

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

## Proceedings before the Constitutional Court

7. On 15 June 2016, the Applicants submitted their Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

8. On 12 July 2016, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel, composed of Judges Ivan Čukalović (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.

9. On 28 July 2016, the Court informed the Applicants about the registration of the Referral and sent a copy of the Referral to the Appellate Panel.

10. On 29 July 2016, the Court sent a copy of the Referral to the Privatization Agency of Kosovo (hereinafter: PAK).

11. On 13 September 2016, the Review Panel, after having considered the report of the Judge Rapporteur, recommended to the Court the inadmissibility of the Referral.

**Summary of facts**

12. On 27 August 2007, the SOE "Drithnaja" was privatized.

13. On 27, 28, 29 and 30 October 2011, the PAK has published the final list of employees who are entitled to 20% of proceeds generated by the privatization of the Drithnaja.

14. On 11 and 21 November 2011, N. I. and L. K. filed appeals against the final list with the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter, the Specialized Panel), requesting to be included in the list of employees eligible to participate in 20% of proceeds realized by the privatization of the Drithnaja.

15. On 12 December 2011, PAK filed its objection against the appeal, considering that the appellants have not exhausted legal remedies as they have not complained against the provisional list of PAK, by not challenging the allegation that the appellant N. I. did not work with the Drithnaja from *"12.10.1994 until June 1999"* while the appellant L. K. worked from *"28.12.1987 until June 1999."*.

16. On 4 December 2013, the Specialized Panel (Judgment SCEL-11-0063) approved the appeals as grounded, reasoning that "[...] *it is considered that the one who worked with the SOE during the so-called "period of Serbian interim measures" and was forbidden to continue to work after the war is considered eligible for the list of employees [...] in accordance with the factual circumstances mentioned above under item A. II. 2. B the appellant has shown that he was discriminated against"*.

17. On 26 December 2013, PAK filed with the Appellate Panel an appeal, challenging the inclusion of N. I. and L. K. in the final list and alleging that "*the factual situation was erroneously determined, and, therefore, the substantive law was erroneously applied and requests that the abovementioned appellants be removed from the final list"*.

18. On 21 January 2014, the Appellate Panel delivered the submitted appeal to the appellants N. I. and L. K, providing them with the possibility of the response to the appeal.

19. On 24 February 2014, the appellant L. K. responded to the appeal, requesting that the appeal be rejected as ungrounded.

20. On 26 November 2014, the Applicants requested the Appellate Panel "*to allow them the procedural status of unique co-litigants in case SCEL_11-0063 [...]*".

The Applicants also requested that the request of the appellants N. I. and L. K. for inclusion in the final list be rejected.

21. On 24 December 2014, PAK submitted to the Appellate Panel a supplement to the appeal emphasizing that the appellant L. K. worked in the Social Owned Enterprise "Mulliri" and that she received 20% of proceeds from the privatization of that enterprise.

22. On 29 December 2014, the Applicants filed again with the Appellate Panel a submission specifying their statement of 26 November 2014 and reiterating the same allegations.

23. On 22 January 2015, PAK submitted to the Appellate Panel an "*Additional information*", and attached Judgment of the Specialized Panel of the Supreme Court, showing that the appellant L. K. received 20% of proceeds from the privatization of the Social Owned Enterprise "Mulliri".

24. On 29 October 2015, the Applicants filed another submission with the Appellate Panel with the same allegations.

25. On 9 November 2015, the Appellate Panel informed the Applicants' submission to the appellant N. I. and sent the submission of the appellant L.K. to the Applicants.

26. On 21 January 2016, the Appellate Panel (Judgment AC-I-13-0264) partially approved the appeal of PAK and partially annulled the enacting clause of Judgment of the Specialized Panel of 4 December 2013. In addition, the Appellate Panel emphasized that "*item 1 of the enacting clause of Judgment SCEL-11-0063 of the Specialized Panel of SCSC of 4 December 2013, is partially annulled [...] and this appellant is removed from the final list of the SOE "Drithnaja", whereas item 1 of the enacting clause of Judgment SCEL-11-0063 of the Specialized Panel of SCSC, regarding the appellant [...] is partially upheld, and he remains in the final list.*

27. The Appellate Panel emphasized that "*the PAK appeal regarding the appellant [...] is ungrounded, as the non-challenging of the provisional list is not of influence to remove him from the final list. This appellant will remain in the final list of the SOE "Drithnaja", as his work booklet is opened, and the conclusions of the Specialized Panel that this appellant is eligible to be included in the final list in accordance with Article 10.4 of UNMIK Regulation 23/13, are accurate [...] the PAK appeal regarding the appellant [...] should be approved as grounded as this appellant has already received 20 % for the SOE "Mulliri" and SOE "Kosovarja"/ Zhito Promet based on the judgments above which are final, cannot not further allege to be included in the final list of the SOE "Drithnaja".*

## Applicant's allegations

28. The Applicants claim that the Judgment of the Appellate Panel violated the Applicants' constitutional rights as guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 54 [Judicial

Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 [Right to a fair trial] and Article 13 [Right to an effective remedy] of the ECHR.

29. The Applicants allege that "*A. "all items of material evidence were not analyzed and assessed", B. "the Judgments were not reasoned", these are related to the right to fair and impartial trial, and C. "due to violation to effective legal remedy" [...]*".

30. The Applicants further allege that "*the second instance court did not decide on the declaration for intervention in case SCEL-11-0063 of 26 November 2014 and in specification/regulation of declaration for intervention in case SCEL-11-0063, of 29 December 2014, with the purpose to allow us the status of procedural parties as unique joint litigants in this case* [...]". In addition they also complain that "*the second instance court only indirectly mentioned the intervention of interventionists in the last page of this Judgment*".

31. The Applicants consider that "*it is necessary to impose interim measure of not allowing the payment in the amount of 66.354.03 euro which should have been received by [...], and according to recapitulation of 20% from the proceeds from the privatization according to the list*".

**Admissibility of the Referral**

32. The Court first examines whether the Applicants fulfilled the admissibility requirements established by the Constitution and further provided by the Law and foreseen by the Rules of Procedure.

33. In this respect, the Court refers to paragraph 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

> *1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *(...)*
>
> *7. 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.*

34. The Court also refers to Article 48 [Accuracy of the Referral] of the Law, which provides that:

> *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.*

35. The Court takes into account Rule 36 [Admissibility Criteria] (1) (d) and 36 (2) (b) of the Rules of Procedure, which foresees that:

*(1) The Court may consider a referral if: (d) the referral is prima facie justified or not manifestly ill-founded.*

*(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 violation of the constitutional rights.*

36. The Court recalls that the Applicants claim that the Judgment of the Appellate Panel violated their constitutional rights to fair and impartial trial, to legal remedies and to judicial protection of rights, because of *"not analyzing and assessing all material evidence"* and *"non- reasoning of the judgment"*.

37. In fact, the Court notes that PAK filed an appeal with the Appellate Panel on the grounds of *"erroneous determination of the factual situation, and therefore, the substantive law was erroneously applied"*.

38. In this respect, the Court refers to the Judgment of the Appellate Panel, which concluded that *"PAK appeal is partly grounded, whereas item 1 of the appealed enacting clause [...] should be annulled regarding [...], whereas the PAK appeal regarding the appellant [...], is rejected as ungrounded and item 1 of the enacting clause of the appealed Judgment regarding this appellant should be upheld."*.

39. The Appellate Panel found that *"the PAK appeal regarding the appellant [...] is ungrounded, as the non-challenging of the provisional list is not of influence to remove him from the final list. This appellant will remain in the final list for the SOE "Drithnaja", as his work booklet is opened, and the conclusions of the Specialized Panel that this appellant is eligible to be included in the final list in accordance with Article 10.4 of UNMIK Regulation 23/13, are accurate"*.

40. The Court also recalls that the Applicants alleged the Appellate Panel *"did not decide on the declaration for intervention (...), only indirectly mentioned the intervention of the joint litigants in the last page of this judgment"*.

41. In that respect, the Court notes that the Appellate Panel stated that *"the request of former employees of SOE Drithnaja/Zhitopromet which by their submission of 26 November 2014 requested to intervene in this case, their content is the same and since this Judgment gave solution based on merit for the appeal of PAK, the Appellate Panel finds that it is not necessary to decide regarding the request of the interveners"*.

42. The Court reiterates that it is not the role of the Constitutional Court to determine whether certain types of evidence are allowed, what evidence should be taken, or to specify what evidence is acceptable and what is not. That is the role of the regular courts. The Constitutional Court's task is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way the evidence was taken. (See Case of *Khan v. the United Kingdom*, Application no. 35394/97, paragraphs 34-35, ECtHR Judgment of 12 May 2000)

43. The Court also reiterates that the correct and complete determination of the factual situation and applicable law is a full jurisdiction of regular courts, and that the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and, therefore, it cannot act as a "fourth instance court". (See case *Akdivar v. Turkey,* No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65. See also *mutatis mutandis* the case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

44. The Court considers that the Appellate Panel addressed in its Judgment the essential issues regarding the Applicants' appeal allegation.

45. Although a regular court has a certain margin of appreciation when choosing arguments and admitting evidence, Article 6.1 of the ECHR does not require a detailed answer to each and every argument provided to the court during the conduct of the proceedings. (See *Suominen v. Finland*, No. 37801/97, ECtHR, Judgment of 24 July 2003, para 36; *Van de Hurk v. the Netherlands*, No. 16034/90, ECtHR, Judgment of 19 April 1994, para 61; *Jahnke and Lenoble v. France* (déc.); *Perez v. France* [GC] No. 47287/99, ECtHR, Judgment of 12 April 2004, para 81; *Ruiz Torija v. Spain*, No 18390/91, ECtHR, Judgment of 09 December 1994, para 29; *Hiro Balani v. Spain*, No. 18064/91. ECtHR, Judgment of 9 December 1994 para 27).

46. Therefore, the Court cannot replace the role of the regular courts on interpreting and applying the pertinent rules of both procedural and substantive law. (See *Garcia Ruiz vs. Spain*, No. 30544/96, ECHR, Judgment of 21 January 1999; see also case KI70/11 of the Applicants: *Faik Hima, Magbule Hima and Bestar Hima*, Constitutional Court, Resolution on Inadmissibility of 16 December 2011).

47. The Court considers that the Applicants have not sufficiently substantiated their allegations and have not proven a violation of their rights to fair and impartial trial, to an effective remedy and to judicial protection. Moreover, they failed to show that the proceedings before the regular courts, including the Appellate Panel, were unfair or arbitrary or that their rights and freedoms have been violated.

48. Based on the foregoing, the Court finds that the Applicants' right to fair and impartial trial in the proceedings was respected and, more specifically, they had free access to the court and reasoned judgments were rendered in various stages of the proceedings. The Court further concluded that as a consequence of this, their rights to effective legal remedies and judicial protection were also guaranteed.

49. In sum, the Court recalls that the Applicants have not supported their allegation of a violation of their right to fair and impartial trial and, thus, their rights to effective legal remedies and judicial protection. Therefore, the Referral is inadmissible as ungrounded on constitutional basis.

**Request to hold an oral hearing**

50. As to the Applicants' request to hold an oral hearing, the Court refers to Article 20 of the Law, which provides:

> *"1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.*
>
> *2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files."*

51. The Court considers that, according to Article 20 of the Law, the case files are sufficient to decide on the case.

52. Therefore, the Applicants' Referral for holding an oral hearing is rejected as ungrounded.

**Request for interim measure**

53. The Applicants requested the Court to impose interim measure of *"not allowing the payment of the amount (...) which should have been received by [...], and according to recapitulation of 20% from the proceeds of privatization according to the list."*

54. The Applicants did not provide any argument or a reason why should the Court impose the interim measure. The Applicants merely requested it in their Referral.

55. In order for the Court to impose interim measure, in accordance with Rule 55 (4) of the Rules of Procedure, the Court must determine:

> *"(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."*

56. As mentioned above, the Applicants have not shown *a prima facie* case on the admissibility of the Referral. Therefore, the request for imposition of an interim measure is to be rejected as ungrounded.

**FOR THESE REASONS**

The Constitutional Court, pursuant Article 113.7 of the Constitution, Article 48 of the Law, and Rules 36 (1) (d) and (2) (b), 55 (4) and (5) and 56 of the Rules of Procedure, on 13 September 2016, unanimously

**DECIDES**

I. TO DECLARE the Referral 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** **President of the Constitutional Court**

Almiro Rodrigues Arta Rama-Hajrizi