



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

Pristine, 5 December 2012
Ref. No.: RK368/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 149/11

Applicant

Shefqet Aliu

**Constitutional Review of the Decision of the Special Chamber of the
Supreme Court of Kosovo, ASC-09-0106, dated 7 October 2011**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

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

Applicant

1. The Applicant is Mr. Shefqet Aliu (hereinafter, "Applicant"), represented by Mr. Shabi Sh. Isufi, a practicing lawyer from Gjilan.

Challenged decision

2. The Applicant challenges the decision of the Appellate Panel of Special Chamber of the Supreme Court of Kosovo (hereinafter, the "Appellate Panel") ASC-09-0106 of 7 October 2011, which was served on him on 18 October 2011.

Subject matter

3. The Applicant alleges that the abovementioned decision violated his rights as guaranteed by the Constitution of the Republic of Kosovo (hereinafter, the "Constitution"), Article 10 [Economy], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 34 [Right not to be Tried Twice for the Same Criminal Act].
4. Furthermore, the Applicant requests the Court to impose interim measures stopping the execution of the Judgment of the Special Chamber, ASC-09-0106, for the reason that "[...] *all conditions are fulfilled for issuance of temporary measure for stopping the execution of the mentioned judgment **fomus boni iuris** – the probability exists that the main right for requesting and **periculum in mora** – direct danger for causing damage on the right of this applicant.*" Moreover, the execution of the Judgment would cause the "[...] *workers of the radiator factory and the state of Kosova an un-repairable damage, because the sale value of the SOE "Jugoterm" from 1.100.00 Euro, is smaller than the production material of the company.*"

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 27 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter, the "Law") and Rules 54, 55 and 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the "Rules of Procedure").

Proceedings before the Court

6. On 16 November 2011, the Applicant filed the Referral with the Court.

7. On 5 December 2011, the Applicant requested the Court to impose interim measures.
8. On 17 January 2012, the President appointed Judge Iliriana Islami as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Gjyljeta Mushkolaj.
9. On 17 April 2012, the Court requested the Applicant to clarify the following:

“...

First, the case between "ENG Office" and the KTA (0056) before the Special Chamber of the Supreme Court occurred without you being present, Why did you not submit a request with the Supreme Court to be present as an interested third party in this case? If you were not aware of the case as it was ongoing, why did you not start a new case lodging your complaints with the Supreme Court?

Secondly, what is your material interest that prompted you to request that the results of the tender be invalidated in the first place'?

Thirdly, why did you not request that the Supreme Court call "ENG Office" as a third party or a witness during your case SCC-06-0475?

Finally, please supply copies of all of the documents you submitted when you applied to the Supreme Court.

...”

10. On 24 April 2012, the Applicant replied to the Court providing:

“...

- a) *The issue of the Private Enterprise “ENG Office” from Gjilan and KTA, which is referred to number SCC-08-0056 dated 13.11.2009 in the Special Chamber of the Supreme Court of Kosovo was conducted without my presence, since I was not involved as party in the procedure according to contentious matter, which refers to number SCC-06-0475 dated 08.08.2007, in which matter with the Ruling of SCSC, SCA-08-00007 dated 06.03.2008, was rejected the request for review filed by “ENG Office”, and this ruling was promulgated as final, legally binding and without any right to appeal and review. Since we had to do with a final ruling SCA-08-0007 dated 06.03.2008, by which was rejected the request for review filed by “ENG Office”, and Judgment SCC-06-*

0475 was confirmed, it consists that legal matter was over, therefore I could not foresee that Enterprise ENG Office, could continue with the legal procedure in relation to cancelled tender filed by "ENG Office" according to the abovementioned Judgment. Based on this fact, there was no need to initiate a new case in relation to the issue that had to do with Publicly Owned Enterprise 'Jugoterm', since I have expected all the time that it will be re-tendered. In relation to your question on why I did not initiate a new case to file it to the Kosovo Supreme Court, this I could not have done, since we had to do with adjudicated matter, while when Judgment SCC-08-0056 dated 13.11.2009, was confirmed according to Judgment ASC-09-0106 and now it has final form, therefore I could not file any legal remedy of any court, since after rendering the Ruling SCA -08-0007 was rejected the request for review filed by "ENG Office", and this Ruling was final, legally binding and against it could not have been appealed and reviewed, since SCSC by its decisions had violated the Constitution and the Law, by deciding for the second time on the matter, which earlier adjudicated.

- b) My material interest that urged me to ask for cancellation of tender firstly was "ENG Office" according to the winning had cancelled in a biased way our previous agreement and had eliminated me as shareholder of 30%.
- c) In relation to the raised question, on why it was not required from Kosovo Supreme Court to be invited "ENG Office", as a third party on the case SCC-06-0475, this was not necessary to be done, because "ENG Office" was involved in this case and has filed a request to review SCSC, which was a regular legal remedy, but by the Ruling SCA -08-0007 dated 06.03.2008 was rejected the request private enterprise 'ENG Office" for review, therefore from this fact consists that 'ENG Office" was engaged as a party to the matter SCC-06-0475.
- d) In relation to the request to offer copies and documents when we applied in Kosovo Supreme Court, attached to this response, we send you the claim filed by Shefqet Aliu in Kosovo Supreme Court, while other evidences which might eventually serve you in this case, are found in the request filed by PAK in Kosovo Constitutional Court dated 12.12.2011, under the protocol number 4360 and the case number KI 160/11.

..."

11. On 26 November 2012, President Enver Hasani replaced Judge Iliriana Islami as Judge Rapporteur with Judge Almiro Rodrigues and Judge Gjylieta Mushkolaj on

the Review Panel with Judge Ivan Čukalovič, because their mandate as Judges of the Constitutional Court came to an end on 26 June 2012.

12. On 26 November 2012, the Referral was communicated with the Privatization Agency of Kosovo (hereinafter, “PAK”) and the Special Chamber of the Supreme Court (hereinafter, the “Special Chamber”).
13. On 5 December 2012, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

14. In 2006, the Kosovo Trust Agency (hereinafter, the “KTA”) tendered the sale of New Co “Jugoterm” in Gjilan. The bidders who applied for the published tender were “ENG Office” Gjilan, NPT “Kalabira” represented by Shefqet Aliu (i.e. the Applicant), and “Install Engineering” Prishtina. “ENG Office” from Gjilan was announced as winner.
15. On 14 November 2006, the Applicant complained to the Special Chamber, requesting the tender procedure to be annulled because, allegedly, there were hidden agreements amongst the bidders, whereby he himself was part of these agreements, and thus the rules of tender were violated.
16. On 8 August 2007, the Special Chamber issued a judgment (Judgment SCC-06-0475), whereby it partly admitted the claim. The Special Chamber obliged KTA to annul the tender, in which the Public Enterprise “Eng Office” was announced the winner of the sale of New Co “Jugoterm”, because the Special Chamber found that there were irregularities with the tender procedure. The part of the claim through which is requested from the Special Chamber to order KTA to organize a new tender for the abovementioned New Co is rejected because it is up to KTA to decide a new tender or not.
17. The “Eng Office”, which had bought New Co “Jugoterm”, and the Applicant requested the same Special Chamber to review the Judgment of the Special Chamber of 8 August 2007.
18. On 5 February 2008, the same Special Chamber (Decision SCA-08-0007) rejected “Eng Office’s” request for review, reasoning that no new factual or legal allegation were raised and that the Judgment of the Special Chamber of 8 August 2007 was in accordance with applicable law. This decision was final and binding and could not be appealed.

19. On 3 March 2008, “Eng Office” filed a claim with the Special Chamber against KTA for having violated the rules of tender and proposed that KTA should be obliged to sign the agreement with “Eng Office” as the winner in the bidding process and to pay compensation for material and non-material damages.
20. On 16 April 2008, “Eng Office” filed a request with the Special Chamber to grant an injunction stopping PAK from undertaking any measures in respect to NewCo “Jugoterm”.
21. On 14 November 2008, the Special Chamber (Decision SCC-08-0056) granted the request for injunction and PAK was “[...] enjoined from carrying on any procedure, of whatsoever nature, relative to the privatization of the enterprise Jugoterm until final judgment is delivered in this case.” The Special Chamber held that “[...] taking into account all the facts as they are now before the Chamber, the Chamber finds that the Claimant may Indeed *prima facie* suffer irreparable harm should the enterprise be tendered afresh and awarded to a third party.”
22. On 22 October 2009, the Trial Panel of the Special Chamber of the Supreme Court of Kosovo (hereinafter, the “Trial Panel”) partly admitted “Eng Office’s” claim. The Trial Panel concluded (Judgment SCC-08-0056) that “Eng Office” is the winning bidder, obliged KTA and PAK to find the mean and the procedure in order to conclude the tender and obliged KTA to pay compensation for material damage. The Trial Panel concluded based on the evidence submitted that the annulment made by the KTA Managing Director is invalid because the Board of Directors is the only authorized body to annul the tender. Further, the Trial Panel concludes that this case cannot be considered *res judicata* because the parties in the judgment SCC-06-0475 of 8 August 2007 were different from those that are in this case and the request is also different.
23. On 17 December 2009, PAK filed an appeal with the Appellate Panel against the judgment of 22 October 2009, because the judgment is violating the principle of *res judicata*.
24. On 7 October 2010, the Appellate Panel (Judgment ASC-09-0106) rejected PAK’s complaint as unfounded and upheld the judgment of the Trial Panel of 22 October 2009 (Judgment ASC-08-0056). The Appellate Panel ruled that “*Due to the fact that Claimant of the case in question was not the party of the previous legal process and since the company did not have regular chances to present evidence which support its stance and use ordinary remedies which are in disposal of the party in procedure, from these procedural cases in total should*

be drawn the conclusion that the previous judgment cannot prevent the claim review of the Claimant ENG Office.”

Applicant’s allegations

25. The Applicant alleges that the Special Chamber “with its final judgment annuls the tender, whereas later with another final judgment enables the Private Enterprise ENG office from Gjilan to win this tender which was earlier annulled with a final judgment. This action of the court is contrary to the Constitution of the Republic of Kosovo, for the reason that the court enables ENG office from Gjilan to win a tender which was annulled with a final decision, then a new decision is taken on a matter already once judged. With these actions the provision of Article 10 and Article 34 of the Constitution of the Republic of Kosovo are violated.

26. Furthermore, the Applicant alleges that the Special Chamber with its final Judgments has “*illegally favoured ENG office in Gjilani, while denying the rights of 2 other participants and thus violating the provision Article 24 of the Constitution of the Republic of Kosovo in which the equality of the parties is provided before the law.*” In this respect, the Applicant also claim that “*the Special Chamber intentionally or unintentionally violated the provisions of Article 31 and 32 of the Constitution of the Republic of Kosovo for exceeding its authority by judging in favour of either party to the detriment of other party and at the interest and at the expense of the state and on the other hand to make other parties impossible the right in using the remedies.*”

Admissibility of the Referral

27. The Court notes that the Applicants complain about a violation of the principle *res judicata*, a violation of the right to equality before the law, and a violation of the right to *legal remedies*.

28. In this respect, the Court first examines whether the Applicant have fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

29. As seen above, the Appellate Panel, with a very well reasoned decision, ruled that “*Due to the fact that Claimant of the case in question was not the party of the previous legal process and since the company did not have regular chances to present evidence which support its stance and use ordinary remedies which are in disposal of the party in procedure, from these procedural cases in total should*

be drawn the conclusion that the previous judgment cannot prevent the claim review of the Claimant ENG Office”.

30. Meanwhile, the Court emphasizes that, under the Constitution, it is not up to it to act as a court of fourth instance, when considering the decisions taken by ordinary courts.
31. It is the role of ordinary courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, Garcia v. Spain [GC], no. 30544/96, para. 28, European Court of Human Rights [ECHR] 1999-I).
32. The Court can only consider whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicants 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).
33. In the present case, the Applicant merely disagrees with the courts' findings with respect to the case and indicates some legal provisions of the Constitution as having been violated by the challenged decision (Judgment ASC-09-0106) of the Appellate Panel of the Special Chamber.
34. Namely, the Applicant does not explain how and why the Appellate Panel of the Special Chamber (Judgment ASC-09-0106) violated the principle *res judicata*, the right to *equality before the law*, and the right to *legal remedies*
35. In sum, the Applicant does not show that the proceedings before the Special Chamber 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).
36. Rule 36 (2.d) of the Rules foresees that “the Court shall reject a Referral as being manifestly ill-founded when it is satisfied that (...) the Applicant does not sufficiently substantiate his claim”.
37. Therefore, taking into account the above considerations, it follows that the Referral on the alleged violations must be rejected as manifestly ill-founded.

Request for Interim Measures

38. Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, provide that “when a referral is pending before the Court and the merits of the referral have not been adjudicated by the Court, a party may request interim measures.

39. However, taking into account that the Referral was found inadmissible, the Applicant is not entitled under Rule 54 (1) of the Rules of Procedure to request interim measures.


FOR THESE REASONS

The Constitutional Court, pursuant to Rule 36 (2.d) of the Rules of Procedure, Article 27 of the Law and Rule 54 (1) of the Rules of Procedure and Rule 56 (2) of the Rules of Procedure, on 5 December 2012, unanimously,

DECIDES


- I. TO REJECT the Referral as Inadmissible;
- II. TO REJECT the request for Interim Measures;
- III. 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;
- IV. This Decision is effective immediately.

Judge Rapporteur


Almiro Rodrigues



President of the Constitutional Court


Prof. Dr. Enver Hasani