



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

Prishtina, on 1 August 2016
Ref. No.:RK973/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI59/16

Applicant

Kosovo Privatization Agency

**Constitutional review of Decision AC-I-15-0237 of the Appellate Panel of
the Special Chamber of the Supreme Court of Kosovo on
Kosovo Privatization Agency Related Matters,
of 18 February 2016**

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
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral is submitted by Kosovo Privatization Agency (hereinafter, the Applicant), represented by its officials Armend Hamzaj and Agron Kajtazi.

Challenged decision

2. The Applicant challenges the Decision AC-I-15-0237 of the Appellate Panel of the Special Chamber of the Supreme Court on Kosovo Privatization Agency Related Matters (hereinafter, the Appellate Panel), of 18 February 2016.
3. The Challenged Decision was served on the Applicant on 2 March 2016.
4. The Applicant requests to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court) to impose an interim measure in order “*to suspend all the court [Special Chamber] hearing sessions where to PAK or a Socially Owned Enterprise is a party*”.

Subject matter

5. The subject matter is the constitutional review of the challenged Decision, which allegedly “*has violated the fundamental principles of justice, such as the principle of Res Judicata and Ne bis in idem*” (...) and “*made also a constitutional violation of Article 31 of the Constitution of Kosovo*”.

Legal basis

6. The Referral is based on Articles 21.4, 113.7 and 116.2 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 27.1 and Article 47 of the Law No. 03/121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rules 29 and 54 of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 29 March 2016, the Applicant submitted the Referral to the Court.
8. On 31 March 2016, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Ivan Ćukalović (presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.
9. On 5 April 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Special Chamber.
10. On 13 June 2016, 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

11. On 17 January 2011, an interested party filed with the Specialized Panel (SCL-11-0003) a claim against the Applicant, requesting compensation of personal incomes in a certain amount of Euros, including legal interest until final payment.

12. On 02 June 2015, the Specialized Panel held a hearing, where the Applicant was represented by representatives authorized by PAK.
13. On 27 October 2015, the Specialized Panel held another hearing where the same representatives authorized by PAK appeared again to represent the Applicant. However, the Specialized Panel did not allow them to represent the Respondent because they were not registered in the Kosovo Chamber of Advocates but they are registered in the Albanian Chamber of Advocates.
14. On 28 October 2015, the Specialized Panel (Decision SCL-11-0003) determined that *"the representatives of the [Privatization Agency Kosovo - PAK] Respondent (...) are hereby dismissed from the case since they are not members of a Bar Association or a Chamber of Advocates in Kosovo"*.
15. On 30 October 2015, the Applicant filed an appeal claiming the annulment of the said decision, unification of judicial practice for similar cases and reimbursement of the Applicant for any court fees to be paid for its appeal. Moreover, the Applicant asserted that the sole legal condition for a representative is to be a member of "an" Association or Chamber of Advocates.
16. On 18 February 2016, the Appellate Panel (Decision AC-I-15-0237) rejected as inadmissible the *"appeal against decision of the SCSC Specialized Panel SCL-11-0003, dated 28 October 2015"*, due to *"the principle that every claimant and respondent has to be represented by a member of a bar association or a chamber of advocates"*

Applicant's allegations

17. The Applicant claims a violation of *"principles of justice, such as the principle of Res Judicata and Ne bis in idem"* and a *"violation of Article 31 of the Constitution of Kosovo"*.
18. The Applicant also alleges that the Special Chamber *"made also a constitutional violation of Article 31 of the Constitution of Kosovo, stipulating: 'Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers'"*.
19. The Applicant requests the Court *"to annul Decision SCL-11-0003 of the Specialized Panel, of 28 October 2015 and Decision AC-I-15-0237 of the Appellate Panel, of 18 February 2016, rendered by the Special Chamber"*.
20. Finally, the Applicant requests the Court to impose interim measures in order to avoid *"an irreparable damage to both the PAK and the Socially Owned Enterprises that are simultaneously represented by the PAK which acts as their administrator"*.

Admissibility of the Referral

21. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

22. In this respect, the Court refers to Articles 21 [General Principles] and 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

Article 21
(...)

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

Article 113

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.

23. The Court also refers to Article 48 [Accuracy of the Referral] which provides:

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.

24. Furthermore, the Court also takes into account Rule 36 [Admissibility criteria] (1) (d) and (2) (d) of the Rules of Procedure which foresees:

(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:

[...]

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

25. The Court recalls that the Applicant claims a “violation of Article 31 of the Constitution of Kosovo”, because the challenged decision violated its right “to be represented by its officials before the SCSCK”. The Applicant also refer to violation of the principles *res Judicata* and *ne bis in idem*.
26. The Court further notes that the main argument of the Applicant is whether the applicable law in Kosovo should be interpreted to require the Applicant to be represented in the proceedings before the Special Chamber of the Supreme Court by a lawyer registered with the Kosovo Bar Association or a lawyer of its own choosing.
27. In fact, the Applicant complains that the Special Chamber of the Supreme Court erroneously interpreted the law with regard to representation and

considers that the Special Chamber should have construed the relevant legal provisions in a different way.

28. In that respect, the relevant part of the Decision of the Appellate Panel reads as it follows.

“The Law on the Special Chamber and the Annex do not answer this question. That article 24.1 of the Annex mentions members of a “bar association or a chamber of advocates” does not reliably indicate that members of other bar associations or chambers of advocates than that of Kosovo are meant. First of all it has to be acknowledged that the clear rule that parties have to be represented by a member of bar association in Kosovo or in Serbia and the discretion of the Presiding judge to allow members of a bar other than in Kosovo or Serbia provided by the previous legislation (see section 24 .1 and 24.3 of the UNMIK Administrative Direction 2008/6) have been replaced by the legislator by article 24.1 of the Annex, stating that every claimant and respondent has to be represented by a member of a bar association or a chamber of advocates. Furthermore it cannot, be ignored that the determination of a vague legal term such as “member of a bar association or a chamber of advocates” in a Kosovo Law has to be achieved within the legal framework of Kosovo. The Kosovo law addressing the problem at hand is Law No 04/L-193 on the Bar (LoB) . It regulates the right to practice bar in Kosovo including the right of audience in Kosovo courts. According to article 1.1. LoB the right to practice bar in Kosovo is granted following the registration in the Registry of the Kosovar Chamber of Advocates. Although prerequisites and procedures to be registered are different for local lawyers and foreign lawyers the latter have the possibility to be registered and allowed to practice bar in Kosovo. Pursuant to Article 40.1 of the LoB, a foreign lawyer can practice bar in Kosovo under reciprocity conditions, and there should be a confirmation of the reciprocity agreement by the Ministry of Justice after having got an opinion by the Chamber of Advocates. This issue is explicitly regulated by Article 2 of Annex to the Statute of Kosovo Bar Association (KBA) which provides that “Lawyers from other countries in order to practice bar in the territory of the Republic of Kosovo, must undergo eligibility exam organized by the KBA, in one of the official languages in Kosovo. The form, content and other eligibility test procedures are defined by the Regulation on Licensing of foreign lawyers.” An exception to this rule is provided only for lawyers from the Member States of the European Union and United States of America. Both foreign lawyers from other countries and from EU member States and USA should be registered on the Special Register of Lawyers of the Kosovo Chamber of Advocates (KCA), subject to the provision of a document which proves that they are registered on their own states and they practice the bar (Article 40.5 of the LoB). Pursuant to powers-of-attorneys issued by PAK, lawyers Gentian Gurra and Rudi Metaj, have represented PAK in the proceedings with the finds instance court for the case SCL-II-0003, by introducing themselves as attorneys licensed with the National Chamber of Advocacy in Albania. These lawyers representing PAK provided no evidence for the court to have been registered in the list of Kosovo Chamber of Advocates”.

29. The Court notes that the Appellate Panel explained the meaning of Article 24.1 of the Annex to the Law on Special Chamber; the different requirements between the previous and current legislation; the legal requirements that lawyers must meet in order to represent claimants or respondents before the Special Chamber. After having considered these legal matters, it concluded that lawyers representing the Applicant in court proceedings before it are not lawyers registered with the Kosovo Bar Association, as required by the applicable law in Kosovo.
30. The Court considers that the Applicant alleges violation of legal principles as well as Article 31 of the Constitution without any substantiation or explanation as to how such violation occurred. The Applicant bases his claim on erroneous interpretation of the applicable law. That procedural argument pertains to the domain of legality and as such does not fall under the jurisdiction of the Constitutional Court and thus it cannot be reviewed by the Court.
31. In this respect, the Court emphasizes that it is not its task to deal with errors of law allegedly committed by a regular court (legality) unless and in so far as such errors may have infringed rights and freedoms protected by the Constitution (constitutionality). It may not itself assess the law which have led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of “fourth instance”, which would be to disregard the limits imposed on its jurisdiction. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (See *García Ruiz v. Spain*, [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I; Case No. KI72/14, Applicant *Besa Qirezi*, Judgment of 4 February 2015, para.65).
32. Moreover, the Court considers that the Judgment of the Appellate Panel thoroughly answered to and reasoned the Applicant’s appeal arguments. The Applicant has not succeeded to show and prove before the Court that the Special Chamber’s proceedings were unfair or tainted by arbitrariness or that his rights and freedoms protected by the Constitution have been infringed by the alleged erroneous interpretation of the applicable law on representation.
33. The Court emphasizes that interpretation of the applicable law on representation is a matter of legality. No constitutional matter has been substantiated and proved by the Applicant.
34. The Court reiterates that, as a general rule, the interpretation of law is a matter solely for the regular instances whose findings and conclusions in this regard are binding on the Constitutional Court. However, where a decision of a regular court is clearly arbitrary, the Court can and must call it into question. (See *Sisojeva and Others v. Latvia*, [GC], application no. 60654/00, Judgment of 15 January 2007, para. 89).
35. The reference made by the Applicant to violation of the principles *res judicata* and *ne bis in idem* will not be considered by the Court as it is an irrelevant and not pertinent argument for the discussion of the Applicant’s case.

36. In addition, the Court notes that the Applicant disagrees with the outcome of his case; however, the disagreement cannot of itself raise an arguable claim of a breach of Articles 29 [Right to Liberty and Security], 30 [Right of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution. (See, for example, Constitutional Court Case No. KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 May 2012, paragraph 28).
37. Therefore, the Court finds that the Applicant's Referral does not meet the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.
38. Consequently, the Referral is manifestly ill-founded on constitutional basis and, pursuant to Rule 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure, is inadmissible.

Request for interim measure

39. The Applicant requested the Court to impose interim measure in order to *"suspend all the court [Special Chamber] hearing sessions whereto PAK or a Socially Owned Enterprise is a party"*.
40. The Applicant did not provide any arguments or reasons as to why the interim measure should be granted by the Court. The Applicant merely requested it in his Referral.
41. In order for the Court to decide on an interim measure, pursuant to Rule 55 (4) and (5) of the Rules of Procedure, it is necessary that:

"(a) the party requesting interim measures has shown (...), 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."
42. As emphasized above, the Applicant has not shown a prima facie case on the admissibility of the referral. Therefore, the request for interim measure must be rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 21.4, 113.7 and 116 (2) of the Constitution, Article 48 of the Law and Rules 36 (1) (d) and (2) (d) and 55 (4) and (5) of the Rules of Procedure, on 13 June 2016, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY the Parties of this Decision;
- 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

Almiro Rodrigues



President of the Constitutional Court

Arta Rama-Hajrizi