



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, 22 August 2014
Ref. no.: RK705/14

RESOLUTION ON INADMISSIBILITY

in

Case no. KI92/14

Applicant

Fidaie Bytyqi

**Request for constitutional review of the Judgment of the Supreme Court
of Kosovo, Rev. E. no. 1/2014, of 12 February 2014**

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 and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mrs. Fidaie Bytyqi (hereinafter: the Applicant) from Malisheva, the owner of NNP "Shkoza F07", with the office in Prishtina, who is represented by Mr. Nezir Bytyqi, lawyer from Prishtina.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo, Rev. E. no. 1/2014, of 12 February 2014, which was served on the Applicant on 26 March 2014.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment of the Supreme Court, which allegedly violated the Applicant's rights, guaranteed by the Constitution of Kosovo, under Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], as well as Article 6 [Right to a Fair Trial] and Article 1 of Protocol 1 [Protection of Property] of the European Convention of Human Rights (hereinafter: the Convention).

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of the Law on the Constitutional Court no. 03/L-121 (hereinafter: the Law) and Rule 56 of the Rules of Procedure of the Constitutional Court of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 20 May 2014, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 10 June 2014, the President of the Court, by Decision No. GJR. KI92/14, appointed Judge Robert Carolan as Judge Rapporteur and on the same date, appointed the Review Panel, composed of Judges: Snezhana Botusharova (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.
7. On 11 June 2014, the Court notified the Applicant and the Government of Kosovo –the Ministry of Infrastructure, on the registration of the Referral.
8. On 11 June 2014, the Supreme Court was notified on the registration of the Referral and was served with a copy of the Referral.
9. On 26 June 2014 Judge Kadri Kryeziu notified the Court in writing of his not taking part in the deliberations for the period June-July 2014 awaiting the Court's decision regarding certain allegations raised against him.
10. On 2 July 2014 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 15 October 2009, NNP "Shkoza F07", a private company, which owner is the Applicant, has concluded contract no. MTPT 9/087511 with the Ministry of Transport and Telecommunication (hereinafter: MTPT, now transformed into the Ministry of Infrastructure) for performing the works: asphaltting of local

roads Dubovc-Beqiq-Skenderaj-Vushtrri. After finishing the works, provided by the contract, the contractor would be paid the monetary amount as specified in the contract.

12. According to the Applicant, while performing the works on the ground, appeared the urgent need for the additional works, requested by the project manager, and these works were recorded in the construction book and were recognized by the committee, established by the MTPT Secretary. Although the additional works were finished, they were not paid by the respective ministry, despite several requests by the Applicant.
13. On 19 October 2010, the Applicant filed a claim with the District Commercial Court in Prishtina, against the Government of Kosovo–MTPT, for the payment of debt in the name the performed additional works.
14. On 14 December 2010, the District Commercial Court in Prishtina rendered the Judgment I.C. no. 384/2010, by which it approved the Applicant's statement of claim and obliged the respondent, the Government of Kosovo- the MTPT-Prishtina, to pay to the Claimant in the name of debt, the amount of 46.455,10€, with annual interest rate of 3,5%, starting from the day of filing the claim, until the final payment.
15. In the reasoning of the Judgment, the Commercial Court stated among the other:

"The works were performed according to the order of the supervisory body, which admitted all additional works, based on Article 8.4 of the basic contract. In addition, the party has stated that the works have not started without the signature of the supervisory body and after the signature by the supervisory body, the additional works were finished and admitted by the approval committee of MTPT"...and it was further stated in the Judgment that "The Court concluded that the contractors may perform unforeseen works even without previous consent of the orderer, if due to emergency there was no opportunity to take this consent, Article 634 of LOR".

16. On 9 October 2013, the Court of Appeal, decided upon the appeal of the Government of Kosovo–the MTPT, rendered the Judgment Ac. no. 159/2012, rejecting as ungrounded the respondent's appeal and upholding the Judgment of the District Commercial Court in Prishtina, I.C. no. 384/2010, of 14 December 2010.

17. In the reasoning of this Judgment, the Court of Appeal, held among the other:

"The Court of Appeal of Kosovo, found that the first instance court, by determining correctly and completely the factual situation, applied correctly the contested procedure provisions and the material law, when it found that the claimant's statement of claim is grounded. According to this court, the challenged judgment does not contain substantial violations of the contested procedure, which this court observes ex-officio, pursuant to Article 194 of LCP".

18. On 12 February 2014, the Supreme Court of Kosovo, deciding upon the revision filed by the MTPT, rendered the Judgment Rev. E. no. 1/2014, by which it approved the revision as grounded and decided to modify the Judgment of the Court of Appeal of Kosovo, Ac. no. 159/2012, of 9 October 2013, and the Judgment of the District Commercial Court in Prishtina, C. no. 384/2010, of 14 December 2010, and rejected as ungrounded the Applicant's claim regarding the payment of debt, in the name of the performed works.
19. In the reasoning of the Judgment, the Supreme Court stated:

"The Supreme Court of Kosovo approved as grounded the allegations from the revision with regards to the erroneous application of the material law, since the lower instance courts have erroneously approved as grounded the claimant's statement of claim, due to the fact that the claimant did not act pursuant to Article 633 of LOR, applicable pursuant to Article 1057 of LOR, in force from 20.12.2012, since according to this legal provision, it was provided that for any avoidance from the contract, the executor, here the claimant, should take written consent by the orderer and he cannot request any increase of payment for the works he performed without consent of the work orderer".
20. The Supreme Court, in the Judgment of revision, further reasoned:

"Therefore, based on the legal provision mentioned above, and on the fact that the claimant has not informed that claimant on time and in written form, for the need to perform the additional works on one side, in order that they agree on these works and possibly to conclude an annex contract and that in the present case it is not about the urgent works, unforeseen by Article 634 of LOR".

Applicant's allegations

21. The Applicant alleges that the Judgment of the Supreme Court has violated the rights of her business entity guaranteed by the Constitution to a fair and impartial trial and the right to protection of property [Article 31 and 46] of the Constitution and the right to a fair trial and protection of property guaranteed by the Convention [Article 6 and Article 1 of the Protocol 1 of the Convention].
22. According to the Applicant, the right to a fair trial was violated, since the Supreme Court erroneously applied the material law, by applying the Law on Obligational Relationships, instead of the Law on Public Procurement, which is *Lex Specialis* for this field, whereas as a consequence of this action of the Court, the Applicant was denied the right to property, because she had "legitimate expectation" of the property, based on the finished works. In this regard, the Applicant referred to Judgment of the Constitutional Court in case KI40/09, *Ibrahimi and 48 other former KEK employees*, where according to her, the Court held that there was a violation of the right to property.
23. The Applicant requested that *"the Constitutional Court decides to declare invalid Judgment of the Supreme Court Rev. E. no.1/2014, and remand the*

case to the Supreme Court to decide based on identified violations and findings by the Constitutional Court”.

Assessment of the admissibility of Referral

24. In order to be able to adjudicate the Applicant’s Referral, the Court needs to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure.

25. In this respect, the Court refers to Article 113.7 of the Constitution, which provides:

“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”.

26. The Court notes that the Applicant challenges the Judgment of the Supreme Court, Rev. E. no. 1/2014, of 12 February 2014, by which the MTPT revision was approved as grounded, whilst the Applicant’s claim for compensation of the debt requested from MTPT, was rejected as ungrounded.

27. The Court further finds that the Applicant alleges that her rights guaranteed by the Constitution and the Convention, as specified in paragraph 20 of this report, have been violated.

Article 31 of the Constitution [Right to Fair and Impartial Trial] provides:

“1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law”.

[...]

Article 46 [Protection of Property]

1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.

And Article 6.1 of the Convention:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Article 1 of Protocol No. 1, of the European Convention on Human Rights, provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

28. In reviewing the Applicants' allegations, the Court finds that the Applicant has only argued that the Constitution and the Convention have been violated, but she has not provided any evidence of the way and the nature of the alleged violations could have occurred. The Court recalls that the mere description of the provisions of the Constitution and the allegation that they have been violated, without presenting evidence of the way they were violated, without specifying the circumstances, without specifying actions of the public authority, that are contrary to fair and impartial trial, does not constitute sufficient grounds to convince the Court that there has been a violation of the Constitution and of the Convention regarding a fair and impartial trial.
29. The Court has found that in all stages of the court proceedings, the Applicant's complaints have been of legal character and never, in any stage, of the constitutional nature or of possible violation of human rights, protected by the Constitution, which for the first time has been raised before the Constitutional Court, which leads the Court to conclusion that, in fact, the Applicant is unsatisfied with the final outcome of the trial of her case.
30. The application of applicable law and the correct and complete determination of the factual situation in a civil case before a regular court is full and undisputed jurisdiction of that court, and in the present case, the Supreme Court had clearly concluded that *"for any avoidance from the contract, the executor, here the claimant, should take written consent by the orderer and he cannot request any increase of payment for the works he performed without consent of the work orderer"*. Therefore, it is not the task of the Constitutional Court to interfere with this jurisdiction, and in the circumstances in the present case, when the application of law is challenged, the Court cannot find violation of Article 31 of the Constitution or of Article 6 of the Convention.
31. The Court further concludes that the Applicant's allegation that her case is similar to

the case KI40/09 of the Court is not grounded , because in the case KI40/09, the Court found that the Judgment of the Supreme Court had erroneously relied in it's judgment on a law that was never formally adopted and found that a pension disability fund had been established when, indeed, that pension disability fund had never been established. This action of the Supreme Court made the Judgment arbitrary, because this was the substantial fact on which depended the legitimate expectation for material compensation of the Applicant. In contrast, in the Applicant's case, the court applied an existing law and acted in full compliance with its constitutional and legal jurisdiction. Therefore, there is no arbitrariness in the Applicant's case, and consequently, no violation of the right to property.

32. The Court reiterates that it is not a fact finding court, it does not adjudicate as a court of fourth instance, and it is not merely a higher instance court. It is essential for the Court the issues on which existence depends the assessment of possible violations of the constitutional rights and not clearly legal issues, which were mainly the facts presented by the Applicant (See, *mutatis mutandis*, i.a., *Akdivar v. Turkey*, 16 September 1996, R.J.D, 1996-IV, para. 65).
33. The Court recalls that in the case KI53/14 submitted from the applicant NTP "Llabjani" in the similar circumstances ,with the same subject of review, the Court decided for the inadmissibility of the referral(See Resolution on Inadmissibility KI53/14 ,7 July 2014)
34. The Court recalls that the mere fact that the Applicants are dissatisfied with the outcome of the case cannot of itself raise an arguable claim of a breach of the provisions of the Constitution (see *mutatis mutandis*, Judgment ECHR Appl. No. 5503/02, *Mezotur Tizsazugi Tarsulat v. Hungary*, or the Resolution of the Constitutional Court, Case KI128/12 of 12 July 2013, the Applicant *Shaban Hoxha* in the request for constitutional review of the Judgment of the Supreme Court of Kosovo, Rev. no. 316/2011).
35. In these circumstances, the Court finds that the facts presented by the Applicant do not in any way justify the allegation for violation of a constitutional right, and it cannot be concluded that the Referral is grounded and, therefore, in accordance with Rule 36, paragraph 2, item b, it found that the Referral should be rejected as manifestly ill-founded and should be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law and Rules 36 and 56 (2) of the Rules of Procedure, on 2 July 2014, 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. This Decision is effective immediately.

Judge Rapporteur



Robert Carolan



President of the Constitutional Court



Prof. Dr. Enver Hasani