



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

Prishtina, on 4 December 2017
Ref. No.: RK 1160/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI16/17

Applicant

J.S.C. “Emin Duraku”

Request for constitutional review of Judgment AC-I-15-0297-A0001-A0002 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, of 16 September 2016

THE 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 the enterprise J.S.C. “Emin Duraku” Gjakova (hereinafter: the Applicant), which is represented by Bejtush Isufi, a lawyer.

Challenged decision

2. The Applicant challenges Decision No. AC-I-15-0297-A0001-A0002 (hereinafter: the challenged Decision) of the Appellate Panel of the Special Chamber of the Supreme Court (hereinafter: the Appellate Panel of SCSC), on Privatization Agency of Kosovo Related Matters (hereinafter: PAK), of 16 September 2016.
3. The challenged decision was served on the Applicant on 25 October 2016.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged decision of the Appellate Panel of SCSC, which has allegedly violated its rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 paragraph 1 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the Convention).

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 21.4 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 20 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 20 March 2017, the President of the Court appointed Judge Selvete Gërzhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Bekim Sejdiu and Gresa Caka-Nimani.
8. On 11 April 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Special Chamber of the Supreme Court on PAK Related Matters.
9. On 21 June 2017, the Court also notified the PAK about the submission of the Referral.
10. On 24 October 2017, the Review Panel reviewed the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. On 19 August 1991, the councils of employees of limited liability companies (LLC) decided on the transformation of Business Corporations and LLC into Joint Stock Company Holding "Emin Duraku" JSC. This decision was based on

Article 145 item b and Article 196 item g of the Law on Enterprises (OG of SFRY No. 77/88, 40/89).

12. On 31 December 1991, the Applicant was registered as JSC with the Commercial Court of Gjakova.
13. On 9 August 2000, the Applicant was registered with a temporary business number (80192983) at the UNMIK Registry Office.
14. On 19 November 2002, the Applicant submitted a request to the Kosovo Bar Association, the Commercial Chamber of Gjakova, by seeking professional opinion regarding the validity of the transformation of status from a socially-owned enterprise into a joint stock company conducted during 1991-1993.
15. On 22 November 2002, the Bar Association responded to the Applicant's request, claiming that the transformation of the enterprise was done in accordance with the Law on Enterprises (Official Gazette of SFRY 77/1988).
16. At the beginning of 2006, the Applicant filed a claim with the Commercial District Court in Prishtina requesting that this court orders the Business Registration Agency of Kosovo in the Ministry of Trade and Industry for registration of SOE "Emin Duraku" in the business books.
17. On 24 May 2006, the District Commercial Court in Prishtina approved the Applicant's request and ordered the Kosovo Business Registration Agency in the Ministry of Trade and Industry to register the SOE "Emin Duraku" in the business books.
18. On 13 July 2007, the Kosovo Trust Agency (KTA) (the predecessor of PAK) sent to socially owned enterprises of Gjakova a proposal for reformation of all socially-owned enterprises (SOEs), including the Applicant.
19. On 3 August 2007, the socially-owned enterprises of Gjakova sent a counter-proposal to the KTA, with some minor changes.
20. On 21 July 2008, the Applicant filed a claim with the SCSC, requesting recognition of the status of the joint stock company.
21. On 29 April 2010, the PAK Board issued a conclusion that the Applicant has the status of a Socially Owned Enterprise.
22. On 20 July 2010, the Applicant filed a request with the Review Panel of the PAK to annul the decision of the PAK Board of 29 April 2010.
23. On 10 August 2010, the Board of Directors of the Executive Branch of the Municipality of Gjakova proposed to PAK to suspend the decision on privatization of the company "Emin Duraku" in the Wave 45A pending completion of the audit procedure, as the company was not subject to the audit procedure, or until the judicial proceedings initiated by the claimant in the SCSC are completed.

24. On 28 August 2010, the Applicant filed a request with the SCSC for the imposition of interim measure to prevent the PAK from selling the property and other assets of the Applicant through the privatization wave.
25. On 7 September and 4 October, 2010, the PAK decided that the SOE "Emin Duraku" would be privatized through wave 45 A and 46 of the privatization.
26. On 13 September 2010, the Applicant again filed a request with the SCSC for the imposition of interim measure to prohibit the PAK in announcing the tender for the privatization of the Applicant's property and assets until the completion of the court proceedings.
27. On 22 September 2010, the SCSC sent a copy of the Applicant's request to the PAK to provide its response, which on 29 September 2010 filed the response.
28. On 8 October 2010, the Applicant submitted a Referral to the Constitutional Court (Referral KI99/10) and requested the constitutional review of the PAK Decision of 7 September 2010 regarding the privatization of the enterprise through wave 45A and 46. At the same time, the Applicant requested the Court to impose interim measure to prevent privatization.
29. On 2 November 2010, the SCSC (Order SCC-08-0237) upheld the Applicant's request for interim measure until the latter decides with a final decision on the case. Against this decision, the PAK filed a complaint with the Appellate Panel of the SCSC.
30. On 9 May 2011, the Applicant submitted another Referral to the Constitutional Court (Referral KI65/11) for the assessment of Order SCC-0041 of the SCSC of 27 April 2011.
31. On 19 May 2011, the Appellate Panel of the SCSC (Order ASC-10-0088) approved the PAK appeal and annulled the order of the Trial Panel of SCSC, ordering the latter to reconsider the order for interim measure.
32. On 2 March 2011, the Applicant filed a new request for interim measure to suspend the execution of the PAK decision of 9 April 2008, which changed the management of Holding Company "Emin Duraku". The Applicant's request was related to the reinstatement of the previous management and all employees to their working places.
33. On 4 March, PAK submitted a response to the request of 2 March 2011.
34. On 27 April 2011, the SCSC asked the Applicant to clarify its request and to bring additional evidence to establish the status of existence as a legal person.
35. On 16 May 2011, the Applicant submitted its response to the SCSC.
36. On 23 August 2011, the SCSC was informed that the Applicant filed a Referral with the Constitutional Court (Case KI65/11) for the assessment of the SCSC order of 27 April 2011.

37. On 28 September 2011, the SCSC rejected the Applicant's request for interim measure because it had not submitted sufficient evidence regarding its allegations.
38. On 31 October 2011, the Applicant filed an appeal with the SCSC against the decision of 28 September 2011.
39. On 23 November 2011, the Constitutional Court decided to declare the Applicant's Referral KI99/10 inadmissible on the ground of non-exhaustion of legal remedies, thus rejecting also the request for interim measure.
40. On 17 August 2012, the SCSC requested the Applicant to submit a copy of the complaint of 31 October 2011 in English.
41. On 27 September 2012, the Applicant submitted a copy of the complaint in English.
42. On 15 October 2012, PAK and UNMIK on behalf of the KTA submitted a response to the complaint.
43. On 21 January 2013, the Constitutional Court declared the Applicant's Referral KI65/11 inadmissible, due to non-exhaustion of legal remedies.
44. On 15 December 2015, the Specialized Panel of the SCSC, by Decision SCC-08-0237, approved the Applicant's statement of claim, recognizing the status of the joint stock company.
45. On 30 December 2015, the PAK filed an appeal with the Appellate Panel against the Decision of the Specialized Panel on the grounds that the Judgment was rendered in violation of the provisions of the Law on Contested Procedure.
46. On 16 September 2016, the Appellate Panel of the SCSC (Decision AC-I-15-0297-A0001-A0002) approved the PAK appeal and modified the Decision of the Specialized Panel which approved the Applicant's statement of claim. Furthermore, the Appellate Panel of the SCSC concluded that when transforming the enterprise from the socially owned company into a joint stock company, the criteria and legal provisions in force were not respected.

Applicant's allegations

47. The Applicant alleges that: *In the present case, Decision Fi 4346/91 of the Commercial Court in Gjakova, of 31 December 1991, is res judicata, and this fact has been confirmed also by the first instance of the Special Chamber of the Supreme Court of Kosovo. By this Decision, the enterprise was given the status of a joint-stock company. However, in contradiction with this final Decision, the second instance of the Special Chamber has rendered a Judgment by which it rejects the request for recognition of the aforementioned status, which had been previously recognized by the Commercial Court. Due to this reason, the Special Chamber of the Supreme Court of Kosovo has committed a violation of Article 31 of the Constitution of the Republic of Kosovo, as well as Article 6 of ECHR."*

48. Moreover, the Applicant in relation to its allegation of violation of constitutional rights refers to the Judgment of the Constitutional Court in case KI51/11 of 19 June 2012 and claims that the case in question should be applied in the same way in the present case.
49. In addition, the Applicant requests the Court to: *I. The Referral is declared admissible. II. To hold that there has been a violation of Article 31 of the Constitution of Kosovo, in conjunction with Article 6 of ECHR, ... To declare invalid Judgment AC-I-15-0297-A0001-A0002 of the Special Chamber of the Supreme Court of Kosovo, and the case is remanded for retrial.*

Admissibility of Referral

50. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and as further specified in the Law and the Rules of Procedure.
51. In this respect, the Court refers to Article 113.7 of the Constitution, which establishes:

“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.”
52. The Court also refers to Article 21 paragraph 4 [General Principles] of the Constitution, which provides:

“4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.”
53. The Applicant must also prove that the Referral was filed with the Court in accordance with Article 49 of the Law, which provides that:

“The referral should be submitted within a period of four (4) months (...).”
54. The Court further assesses the criteria required by Article 48 of the Law, which establishes:

“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.”
55. Based on the provisions above, the Court notes that the Applicant acts in a capacity of a legal entity and is authorized party in accordance with Article 113.7 of the Constitution, has exhausted all available legal remedies, has filed the Referral in accordance with the time limits stipulated by Article 49 of the Law, has accurately stated the articles of the Constitution, which have allegedly violated its rights, and the public authority as a violator of its constitutional rights.

56. In addition, the Court also takes into account Rule 36 (1) (d) and 36 (2) (b) and (3) (g) of the Rules of Procedure, which provide:

"(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 a violation of the constitutional rights.

[...]

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

57. In this case, the Court notes that the Applicant alleges that the Appellate Panel of the SCSC, by its decision, amended the decision of the Special Chamber of the SCSC, confirming that Decision Fi 4346/91 of the Commercial Court of Gjakova, of 31 December 1991, was *res judicata*, thus violating Article 31 of the Constitution and Article 6 of the Convention.
58. The Court notes that the Appellate Panel of the SCSC as a substantive issue had dealt with the transformation of the company's capital, underlining the fact that: *"First instance has erroneously determined the essence of contested matter. The issue at stake is not only and simply transformation into structure and registration of the SOE. The underlying question is if capital of the company has been lawfully transformed from social into private ownership"*.
59. The Court notes that the sole argument of the Applicant in this case is that the Appellate Panel of the SCSC did not recognize the decision of the District Commercial Court in Gjakova, whereby the Applicant was registered as a joint stock company.
60. With regard to this allegation, the Court notes that the Appellate Panel of the SCSC, arguing the allegation of the Applicant as to whether the decision Commercial Court 1991 to register the Enterprise had binding effect, held that: *"the court decisions on registration of Legal bodies have no binding effect and can be challenged as KTA and PAK actually did. Decision on registration does not ratify any irregularity that occurred in the transformation process regardless if the court was aware of it or not"*.
61. In addition, the Appellate Panel of SCSC stated that, *"Workers Council decisions dated: 1 September 1990 and 19 August 1991 on transformation and subsequent court Commercial District Court in Gjakova decision no. Fi 4346/91, dated 31 December 1991 on registration of transformation shall be considered without legal effect."*
62. In this regard, the Court notes that the Appellate Panel of the SCSC concluded conclusion that *"This legal failure determines the validity of entire process of*

transformation of SOE "Emin Duraku" into Joint Stock Company. Transformation is a multi-stage process where validity of each step is determined also by the validity of previous steps. A substantial failure in one stage renders the whole process void even if no other failures have taken place."

63. In this context, the Court notes that the Applicant merely disagreed with the conclusions of the Appellate Panel of the SCSC that the decisions of the Workers' Council and the decision of the Commercial District Court in Gjakova of 31 December 1991 did not produce any legal effect.
64. In the present case, the Court notes that the Appellate Panel of the SCSC in its Judgment addressed all essential issues relating to the Applicant's allegations. The conclusions of the Appellate Panel of the SCSC were reached after a detailed examination of all arguments submitted by the Applicant and the PAK. In this way, the Applicant was given the opportunity to present at all stages of the proceedings arguments and evidence which he considered relevant to the case.
65. In addition, the Court reiterates that it is not the task of the Constitutional Court to deal with errors of fact or the law (legality) allegedly committed by the regular courts unless they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (*see, mutatis mutandis*, ECtHR case *Garcia Ruiz v. Spain*, no. 30544/96, Judgment of 21 January 1999, para. 28).
66. Complete determination of factual situation and correct application of the law is in the jurisdiction of the regular courts (issue of legality). Therefore, the Constitutional Court cannot act as a fourth instance court (See ECtHR case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
67. The Court further considers that all the arguments of the procedural parties that were relevant to the resolution of the dispute were heard, carefully examined and reasoned by the Appellate Panel of the SCSC. Therefore, viewed in its entirety, the Court finds that the proceedings conducted with the Appellate Panel were correct in the constitutionally aspect (*see mutatis mutandis*, ECHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96, paragraphs 29 and 30).
68. With regard to the Applicant's allegation that in identical circumstances such as these, the Court must apply its Judgment in case KI51/11, the Court considers that the circumstances of this case are completely different, both in terms of procedure and substance. This is because in that case the matter was adjudicated in substance, according to the contested procedure by the Municipal Court in Kamenica, which decision became final on 10 June 2009, after being upheld by the Supreme Court. However, in the execution procedure the execution of the final decision of the Municipal Court of Kamenica was suspended by the District Court in Gjilan, due to the filing of a new lawsuit for

the dismissal of the servitude of the Applicant. Concerning the suspension of the execution of the final decision, the Court found that there was no reason for not enforcing the *res judicata* decision, as the second instance court acted.

69. In conclusion, the Court finds that the facts presented by the Applicant do not provide *prima facie* evidence that the rights guaranteed by the Constitution have been violated.
70. Therefore, the Applicant's Referral, on a constitutional basis, is to be declared inadmissible pursuant to Article 48 of the Law and Rules 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 36 (1) (d) and (2) (b) and 56 (2) of the Rules of Procedure, on 4 December 2017, 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. This Decision is effective immediately.

Judge Rapporteur

Selvete Gërxhaliu-Krasniqi

President of the Constitutional

Arta Rama-Hajrizi

