



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

Prishtina, on 4 December 2017
Ref. no.: RK 1158/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 59/17

Applicant

Mejdi Zymberi

**Constitutional review of Judgment E. Rev. 29/2016 of the Supreme Court
of Kosovo, of 27 December 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 Applicant is Mejdi Zymberi on behalf of NTN “Mega Engineering” with seat in Gjilan, represented by Ardi Shita, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Judgment E. Rev. No. 29/2016 of the Supreme Court of Kosovo of 27 December 2016, which was served on him on 25 January 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly, has violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 6 1) [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 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 of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 25 May 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 26 May 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Court appointed the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.
7. On 2 June 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
8. On 18 October 2017, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of Referral

Summary of facts

As to the contested procedure

9. On 19 August 2002, the Applicant filed a claim with the District Commercial Court in Prishtina (hereinafter: the Commercial Court) "Hidroteknika" Company from Gjilan in the capacity of the Contractor and the International Red Cross (hereinafter: the IRC) in the capacity of the donor for payment of the amount of money (22,903 euro) owed on behalf of the additional works performed by the Applicant that exceeded the foreseen construction works with the basic contract concluded between the Applicant and the responding parties.

10. On 27 September 2002, the District Commercial Court (Decision VII C. No. 147/2002) decided to reject the claim due to a lack of legal interest stating that the Applicant could directly file the request for permission to execute the debt.
11. On 14 October 2002, the Applicant submitted to the Commercial Court a proposal to allow the execution of the alleged debt towards the respondents.
12. On 17 October 2002 the Court (Decision No. 103/02) allowed the requested execution.
13. On an unspecified date the first respondent "Hidroteknika" company filed an objection against the decision on permission of the execution.
14. On 4 March 2003, the Commercial Court deciding on the objection (Decision VCL No. 210/2002) declared itself incompetent to decide on this legal matter, deciding also that after this Decision becomes final, the case file should be sent to the Special Chamber of the Supreme Court as a competent court. This Decision under the legal remedy could be appealed to the Supreme Court of Kosovo.
15. On 19 June 2003, the Supreme Court of Kosovo, after reviewing the Applicant's appeal by Decision Ae 34/2003, decided that in the part related to the first respondent ("Hidroteknika") the appeal should be rejected, whereas in the part related to the International Red Cross, to approve the claim, quashing the Decision of the Commercial Court VCL 210/2002 in that part and remanded the legal matter for retrial and in the further proceedings at the Commercial Court.
16. On 28 October 2008, by Judgment II. C. No. 196/2008, the Commercial Court in the repeated procedure, according to the instructions of the Supreme Court, annulled Decision E. No. 103/02 on allowing the enforcement of 17.10.2002 and rejected in entirety the claim of the Applicant regarding the payment of the alleged debt.
17. On an unspecified date, the Applicant filed an appeal with the Supreme Court of Kosovo against the abovementioned Judgment of the Commercial Court.
18. On 2 May 2012, the Supreme Court (Decision Ac. No. 91/2009) decided that: *"The appeal of the claimant is approved as grounded and Judgment II. C. No. 196/2008 of the District Commercial Court in Prishtina of 28.10.2008 is quashed and the case is remanded to the same court for retrial."*
19. On 20 September 2012, the District Commercial Court (Judgment No. 224/2012), in the repeated and conducted proceeding according to the instructions of the Supreme Court, decided to approve the Applicant's claim regarding the respondent "IRC" whereas for the respondent "Hidroteknika" to reject it.
20. On an unspecified date, the IRC filed appeal with the Court of Appeals against Judgment III. c. No. 224/2012 of the District Commercial Court, on the grounds of: essential violations of the provisions of the contested procedure,

erroneous and incomplete determination of factual situation and erroneous application of the substantive law.

21. On 1 March 2016, the Court of Appeals of Kosovo (Judgment (Ac. No. 14/2013), rejected as ungrounded the appeal of the respondent "IRC" and upheld Judgment III C. No. 224/2012 of the District Commercial Court of 20 September 2009.
22. On 27 December 2016, the Supreme Court of Kosovo, deciding upon the request for revision filed by the respondent IRC decided to approve the revision (Judgment E. Rev. No. 29/2016) as grounded, so that it entirely rejected the Applicant's claim regarding the request to oblige the IRC to pay the alleged debt. The Supreme Court found that the International Red Cross did not have passive legitimacy to be a respondent to the dispute.

Enforcement procedure against IRC

23. Given that Judgment Ac. No. 14/2013 of the Court of Appeals became final and enforceable by which the IRC was obliged to pay the Applicant the debt mentioned in the claim, the Applicant on an unspecified date submitted a proposal for execution to the private enforcement agent for the purpose of collecting that debt.
24. On 17 May 2016, the private enforcement agent E.M issued Order P. No. 129/16 for permission of execution.
25. Against the order for allowing the execution of the abovementioned private enforcement agent, the IRC filed an objection with the Basic Court in Prishtina, within the legal deadline, stating, *inter alia*, that this institution has international immunity and cannot be a responding party.
26. On 14 December 2016, the Basic Court in Prishtina (Decision PPP No. 454/16) rejected the objection filed by the IRC.
27. On 19 January 2017, against the Decision of the Basic Court, the IRC filed an appeal with the Court of Appeals of Kosovo alleging that the International Red Cross enjoys immunity based on a memorandum signed with Ministry of International Affairs and these immunities acquitted them from civil responsibility with regard to the debts end degames.
28. According to the documentation attached to the Applicant's Referral it results that this proceeding with the Court of Appeals has not yet been completed.

Applicant's allegations

29. The Applicant alleged that Judgment E. Rev. No. 29/2016 of the Supreme Court of Kosovo, of 27 December 2017, related to the request for revision, has violated the right to fair and impartial trial, because there were elements of contradiction in relation to previous judicial decisions and consequently the court decision is arbitrary and the right to a reasoned judicial decision as an

inseparable component of Article 31 of the Constitution and Article 6 of the ECHR have been violated.

Assessment of admissibility of Referral

a) Regarding the part dealing with the contested procedure

30. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution and as further specified in the Law and in the Rules of Procedure.
31. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties] 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”.*
32. The Court further recalls Article 48 of the Law, 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 public authority is subject to challenge.”*
33. Finally, the Court further refers to Rule 36 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:*
[...]
b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights”.
34. The Court finds that the Applicant’s Referral fulfills the requirements of Article 113.7 with regard to the authorized party and it is filed within the deadlines of Article 49 of the Law, while a part of it did not meet the requirement of exhaustion of legal remedies.
35. The Court notes that the Applicant specifically alleged that Judgment E. Rev. No. 29/2016 of the Supreme Court of the Republic of Kosovo, of 27 December 2016, violated the constitutional right to fair and impartial trial (Article 31 of the Constitution), and the right to fair trial (Article 6 of the ECHR) which has the following content:

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

“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 6 of ECHR [Right to a fair trial]

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

[...]

36. The Court finds that the Applicant's arguments regarding the violation of the right to fair and impartial trial consist in the Applicant's allegation regarding the issuance of contradictory decisions in the courts of the various judicial instances, stating that such decisions had infringed the guarantees of Article 31 of the Constitution and Article 6 of the ECHR concerning the right to a reasoned court decision and an arbitrary court decision.
37. When examining allegations of violation of the right to fair and impartial trial, the Court examines whether the court proceeding was fair and impartial in its entirety, as required by Article 31 of the Constitution (see, *inter alia, mutatis mutandis, Edwards v. the United Kingdom*, 16 December 1992, p. 34, Series A. No. 247, and *B. Vidal v. Belgium*, 22 April 1992, p.33, Series A. No. 235).
38. The Court finds that, as noted in paragraphs 5-17 of the report, that a series of the court proceedings were conducted between the period 2002-2016 at the District Commercial Court and the Supreme Court, and decisions were rendered with various conclusions by which the Applicant’s claim was approved and then in the appeal proceedings the matter was remanded to the first decision-making instance for retrial.
39. Finally, the legal matter as to the contested procedure has taken its legal solution by Judgment E. Rev. No. 29/2016 of the Supreme Court of 27 December 2016 in which, the Supreme Court *inter alia*, reasoned the part related to the first respondent and to the fact whether the Applicant has the right to the required monetary compensation. *”For additional works there has*

not been concluded the annex contract nor the agreement by which the contracted parties would have defined rights and obligations which would have been considered as an offer for completion of additional works. Without the agreement with Ordering party, there is no legal ground for compensation in the name of completion of additional works.”

40. The Supreme Court noted that “pursuant to the provision of Article 630 paragraph 2 of the LCT, on the contracts on construction the written form of contract is required and such a form is required also for the amendment-contract annexes and subsequent amendments without specific form have no legal effects.”
41. Regarding the claim of the second respondent “IRC”, the Supreme Court in the reasoning of the judgment of the revision emphasized that “*The second respondent, the International Red Cross in the present case has no legitimacy since in this legal matter the second respondent was not in substantive-legal relation with claimant since they were not in contractual relation and this also confirmed by the contract that was concluded between the claimant and the first respondent that appear as the contracting parties, whereas the second respondent was a donor of the execution of works and has no obligations on the contract on construction which appears as well from the content of the contract in question.*”
42. Regarding the foregoing, the Court reiterates that it is not its duty under the Constitution to act as a fourth instance court in respect of decisions rendered by the regular courts. It is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law (see: *mutatis mutandis*, *Garcia Ruiz v. Spain*, No. 30544/96, ECtHR, Judgment of 21 January 1999, para. 28. See: also case No. 70/11, Applicant: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011).
43. The Court can only consider whether the evidence was presented in such a way, that the proceedings, viewed in entirety, have been conducted in such a way that the Applicant had a fair trial (see: *inter alia*, *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission of Human Rights of 10 July 1991
44. In addition, the Court considers that Judgment Rev. no. No. 29/2016 of the Supreme Court, as well as lower instance court judgments, provided a full and complete description of the facts of the case and provided numerous reasons for their legal findings in the response to claims submitted by the Applicant. Therefore, the Court considers that the proceedings followed with regard to the case before the regular courts were fair and sufficiently reasoned (see: *mutatis mutandis*, *Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).
45. The Court notes that the Applicant had many opportunities to present his case before the Commercial Court, the Court of Appeals and the Supreme Court, by using the appeal remedies, he actively participated in all stages of the court proceedings, and therefore the proceeding as a whole cannot be considered arbitrary or unfair.

46. The Court, based on its case-law, recalls that in the identical circumstances in Case KI53/14, which had as a subject matter the procedure for monetary compensation for the additional works, had declared the Referral inadmissible, therefore, in the present case there is no reason to deviate from its case law (see: Case No. 53/14 of the Applicant NTP "Llabjani" of 7 July 2014 of the Constitutional Court)
47. In addition, the Court considers that its case KI72/14 mentioned by the Applicant cannot be applicable in this case. In such case, the Constitutional Court declared a violation of the Applicant's rights because the Supreme Court failed to provide clear and complete answers vis-a-vis crucial property submissions of the Applicant. This, in turn, resulted in a violation of the Applicant's right to be heard and his right to a reasoned decision deriving from the guarantees of Article 31 [Right to fair and Impartial Trial] of the Constitution.
48. The Court notes that the present Referral has to do with the compensation of a monetary claim which as such has not been granted or confirmed by the decisions of the regular courts.
49. In conclusion, the Court concludes that as regards the first part, the referral on constitutional basis is not *prima facie* justified and that the facts presented in the Referral by the Applicant do not in any way justify the allegation of a violation of a constitutional right, therefore, in accordance with Rule 36 (2) (a) and (b) the Referral is to be declared inadmissible as manifestly ill-founded.

b) Regarding the enforcement procedure

50. The Applicant alleges that the Judgment of the Court of Appeals Ac. No. 14/2013 of 1 March 2016 was final and enforceable and, therefore, in the enforcement procedure the private enforcement agent E. M. allowed its enforcement as well as the Basic Court in Prishtina by Decision PPP No. 454/16 rejected the objection of the respondent IRC.
51. The Court notes that after the Decision of the Basic Court, the IRC filed an appeal with the Court of Appeals and this procedure has not yet been completed.
52. In the circumstances where there is no final decision in the enforcement procedure, the Applicant's request for this part is premature and, therefore, inadmissible (see, *inter alia*, case of the Court KI151/13 of the Applicant *Sitkije Morina* of 23 December 2013).

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law as well as Rules 29 and 36 of the Rules of Procedure, on session held on the 18 October 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



Snezhana Botusharova



President of the Constitutional Court



Arta Rama-Hajrizi