



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

Prishtina, 30 April 2015
Ref. No.: RK792/15

RESOLUTION ON INADMISSIBILITY

in

Case No. KO22/15

Applicant

Ombudsperson of the Republic of Kosovo

**Request for reconsideration of Resolution on Inadmissibility in
Case KO155/14 of the Constitutional Court of the Republic of Kosovo,
dated 13 November 2014**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge and
Bekim Sejdiu, Judge.

Applicant

1. The Applicant is the Ombudsperson of the Republic of Kosovo, Mr. Sami Kurteshi.

Challenged decision

2. The Applicant challenges the Resolution on Inadmissibility of the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) in Case KO155/14 dated 13 November 2014.

Subject matter

3. The Applicant requests reconsideration of the Resolution on Inadmissibility of the Court in Case KO155/14. He alleges that the Resolution is invalid and is undecided, because it was taken without quorum and thus contrary to Article 19 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the "Law").

Legal basis

4. The Referral is based on Articles 113.2 (1) and 135.4 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") and Articles 29 and 30 of the Law.

Proceedings before the Court

5. On 26 February 2015 the Applicant submitted the Referral to the Court.
6. On 27 February 2015 the President of the Court, by Decision No. GJR. KO22/15, appointed Judge Arta Rama-Hajrizi as Judge Rapporteur. On the same date, the President of the Court, by Decision No. KSH. KO22/15, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Ivan Čukalović and Enver Hasani.
7. On the same date, the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the President of the Republic of Kosovo.
8. On 2 March 2015 Judge Robert Carolan requested the President of the Court in writing to be allowed to be excluded "*from participating in the deliberations and voting in this case*", in accordance with Article 18, paragraph 1.1, of the Law and Articles 1 and 2 of the Code of Judicial Conduct for Judges of the Constitutional Court.
9. On 17 April 2015 the Court, in the absence of the President of the Court, deliberated on the Applicant's request to recuse the President of the Court and decided, unanimously, to reject it. (*See Decision on the request for recusal of the President of the Constitutional Court of the Republic of Kosovo of 17 April 2015*).
10. On the same date, the Court, following the provisions of the Law and the Rules of Procedure and its well established practice, deliberated on the request of Judge Robert Carolan to exclude him and decided, by majority, to grant his request and to exclude him from participating in Referral KO22/15, since Judge Robert Carolan might encounter a conflict of interest.

11. Article 18 [Exclusion of a Judge], paragraphs 4 and 5, of the Law, state:

[...]

4. The decision for exclusion of a judge should be reasoned.

5. Any judge who is aware that he fulfills at least one of the conditions for exclusion from proceedings should inform the President of the Constitutional Court in writing and should request his/her exclusion from the proceedings. In such a case, Paragraphs 3 and 4 shall apply as appropriate.”

12. Furthermore, Rule 7 [Recusal Procedures], paragraphs 1 and 6, of the Rules of Procedure states:

“(1) As soon as a Judge learns of any of the reasons for recusal as foreseen in Article 18 of the Law on Court or if a Judge believes that other circumstances exist that raise a reasonable suspicion as to his or her impartiality, he or she shall recuse from participating in the proceedings and explain the reason in writing to the President of the Court. A copy of that explanation shall be delivered to all Judges.

[...]

(6) When a Judge is recused from a proceeding, the Court shall note in any written decision or judgment that the recused Judge did not take part in the proceedings.”

13. According to the well established practice of the Court based on the Law and the Rules of Procedure, the request for exclusion is made as soon as the judge learns of any of the reasons for exclusion. The request for exclusion of a judge from proceedings is discussed and voted in the absence of the judge concerned. If the request is granted, the judge does not participate in the deliberations and voting in the case, and his/her name does not appear in the composition of the Court in the final decision. (See Cases: KI88/10, Applicant *Agim Paca*, Resolution on Inadmissibility of 22 December 2010; KI70/11, Applicants *Faik Hima, Magbule Hima, Bestar Hima*, Resolution on Inadmissibility of 16 December 2011; and KI79/12, Applicant *Tanasko Djordjević and others*, Resolution on Inadmissibility of 2 December 2013).
14. On 17 April 2015 the Review Panel endorsed the Report of the Judge Rapporteur and unanimously recommended to the Court the Referral to be declared inadmissible.
15. On 20 April 2015 the Resolution on Inadmissibility was distributed to the Judges of the Court.

Summary of facts

16. On 13 November 2014 the Court issued the challenged Resolution on Inadmissibility in Case KO155/14 submitted by the Ombudsperson, who is also the Applicant in the present Referral. The Court held that Case KO155/14 was inadmissible as manifestly ill-founded pursuant to Rule 36, paragraphs 1.c and 2, of the Rules of Procedure. The Court also rejected the request for interim measures.
17. The subject matter of the Referral in Case KO155/14 was the review of the constitutionality of Decree no. DKGJK-001-2014 of the President of the Republic of Kosovo dated 31 August 2014 on the Confirmation of the Continuation of the Mandate of the International Judges of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Decree"). The Applicant alleged that the Decree was in contradiction with the constitutional procedure for the election of the Judges of the Constitutional Court as laid down in Articles 114.2 [Composition and Mandate of the Constitutional Court], 65 (11) [Competences of the Assembly] and 84 (19) [Competencies of the President] of the Constitution.
18. The Applicant maintains that he started an *ex officio* investigation about the procedure having lead to the decision of the Constitutional Court on his Case KO155/14. During the investigation, the Applicant received a letter from Judge Robert Carolan (See Chapter – Applicant's allegations).
19. On 26 February 2015 the Applicant submitted Referral KO22/15 to the Court.

Applicant's allegations

20. The Applicant alleges that the challenged Resolution on Inadmissibility KO155/14 had not been adopted in accordance with Article 19 [Taking of the decisions], paragraph 2, of the Law, which provides that "*The Constitutional Court shall have a quorum if seven (7) judges are present*".
21. It surfaces that the Applicant started an investigation *ex officio* into the proceedings that lead to the Resolution on Inadmissibility and as a response Judge Robert Carolan informed him the following:

"I did not participate in the deliberations or decision of the Court because I had previously recused myself from participating in the deliberations and decision of the Court with respect to [Case KO155/14]".
22. According to the Applicant, "*Judge Carolan sent also a copy of the internal communication of the Constitutional Court, which, according to him, confirms his recusal from the proceedings of the case*".
23. In this letter, Judge Robert Carolan also informs:

"I was present in the Court when Referral KO155/14 was filed and discussed in the Court".

24. The Applicant also requests that the President of the Constitutional Court of the Republic of Kosovo be excluded from participating in the new proceedings related to the present Referral. The Applicant considers that the President of the Court should be excluded, allegedly, “[...] due to (1) his engagement in internal discussions of EULEX related to the procedure for the appointment of the three international judges; and (2) his explicit statement according to which bypassing the Assembly would not represent a constitutional violation in this case.”

Admissibility of the Referral

25. In order for the Court to adjudicate the Applicant's complaint it is necessary to examine whether the Applicant has fulfilled the admissibility requirements as laid down in the Constitution and as further specified in the Law and the Rules of Procedure.
26. The Court recalls that the Applicant alleges that no valid decision was taken by the Court in his previous Case KO155/14 due to a lack of quorum when the Court decided on it.
27. The Court reiterates that it deals with Referrals submitted under Article 113 [Jurisdiction and Authorized Parties], paragraph 2, of the Constitution which provides:

“2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;

(2) the compatibility with the Constitution of municipal statutes.”

28. It stems from that constitutional provision that the Court can, in principle, deal with Referrals submitted by the Ombudsperson.
29. However, this complaint does not come within the scope of this constitutional provision as it can be concluded from the analysis and case law of the Court (See, Case KO97/12, Applicant: *The Ombudsperson*, Judgment of 12 April 2013).
30. The Court also refers to Article 132 [Role and Competencies of the Ombudsperson] of the Constitution which provides:

“1. The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.

2. The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo.”

31. Consequently, the Court concludes that, in the present Referral KO22/15, the Applicant does not raise any issue that possibly would fall within its competence, as provided by the constitutional provisions. Therefore, the Applicant, when submitting the Referral, did not exercise his constitutional functions and competencies. Moreover, the Applicant fails to claim a violation of a specific constitutional provision related to his rights and fundamental freedoms or of an individual or a group of individuals.
32. The Court reminds that any applicant, including the Applicant in the current Referral, has to submit the Referral within its competences and scope provided by the Constitution and the Law.
33. In this respect, the Court refers to a decision (No. 29, of 31 May 2010) of the Constitutional Court of the Republic of Albania, which reviewed a referral brought by the Ombudsperson of the Republic of Albania requesting the annulment of a law concerning the review of the legal validity of the establishment of ownership titles of agricultural land.
34. In this case, the Court notes that the Constitutional Court of the Republic of Albania held:

“According to Article 60 of the Constitution, the Ombudsperson protects rights, freedoms and legitimate interests of the individuals from illegal or irregular actions or omissions of administrative public bodies. Therefore, his interest to set in motion the Constitutional court must be related to its constitutional exercised function, in cases when as a consequence of the application of the law, a sub-legal act, or an action or omission of the public administration, fundamental rights and freedoms of the individuals have been violated. These violations must be recorded in the process of its Ombudsperson’s activities, reviewing the complaints, requests and notifications submitted to the Ombudsperson institution.”

35. In addition, the Constitutional Court of Albania held that the initiation of a procedure by the Ombudsperson “[...] shall be considered as justified, if it can be proven by the applicant that the consequence is direct, thus it comes directly from the subject matter; that it is actual/current and, based on the case, it is strongly connected with the functions and responsibilities of the respective organisation”.
36. Finally, the Constitutional Court of Albania held:

“No institution or public body, which falls under one of the branches of power or not, may not interfere in treating and resolving issues which by its nature, would be central subject of the activity of constitutional institutions or bodies”

[...]

“This means that, in constitutional and legal terms, the power to administer justice, namely the power to resolve civil disputes were given to the courts.”

37. The Court refers also to a decision (No. 40 of 16 November 2007) of the Constitutional Court of the Republic of Albania, where the Ombudsperson of the Republic of Albania challenged the constitutionality of the notion “residence” in the “Electoral Code of the Republic of Albania”.
38. In this case, the Constitutional Court of the Republic of Albania held:

“As previously emphasized, in the case law of this Court, the Ombudsperson, as one of the parties which can set in motion the Constitutional Court, based on Article 143/2 of the Constitution, must justify its interest in the concrete case. Its interest must be related to its constitutional exercised function, in cases when as a consequence of the application of the law, a sub-legal act, or an action or omission of the public administration, fundamental rights and freedoms of the individuals have been violated. These violations must be recorded in the process of its Ombudsperson’s activities, reviewing the complaints, requests and notifications submitted to the Ombudsperson institution.”

[...]

“The Constitutional Court deems it necessary to explain once again the definition of the concept of “interest” in the context of cases brought by the Ombudsperson, based on Article 134/2 of the Constitution, where is provided that this body can bring a request before this Court, only for cases related to its interests. According to Article 60 of the Constitution, the Ombudsperson is a constitutional body, established to protect the rights and legitimate interests of the individual from illegal or irregular actions or omissions of the public administration.”

39. Moreover, it is stated in that decision of the Constitutional Court of the Republic of Albania that *“It is not the Ombudsperson’s role to act on behalf of an individual in court. Legal remedies must be used first and foremost by the individual affected. Yet, whenever an individual for whatever reason does not have effective access to such remedies, it is appropriate for the Ombudsperson to have the capacity to verify whether there has been any violation of human rights. Such a possibility is provided in some countries by the constitutional complaint.”* (See *“The Relationship between Ombudsmen and Judicial Bodies”*, Conference of national ombudspersons from European countries, held in Ljubljana in 2001).
40. The Court also notes that *“The powers of the Ombudsperson in relation to the judicial branch of power may only be such that they do not jeopardise the independence of judges and their impartiality in making judicial decisions.”* (See *“The Relationship between Ombudsmen and Judicial Bodies”*, Conference of national ombudspersons from European countries, held in Ljubljana in 2001).

41. The Court notes that the Ombudsperson, and other public authorities, have no constitutional competence to investigate the decision making process of independent judicial bodies.
42. According to the Ombudsperson, the *ex officio* investigation was initiated in respect of the procedure that lead to the Resolution on Inadmissibility adopted in Case KO155/14.
43. The Court reiterates that it is an independent body in protecting the Constitution and is the final interpreter of the Constitution. In fact, Article 112 of the Constitution provides that:
 - “1. *The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.*
 2. *The Constitutional Court is fully independent in the performance of its responsibilities.*”
44. In addition the Court recalls that “*Kosovo is a democratic Republic based on the principle of the separation of powers and the checks and balances among them as provided in this Constitution*”. (See Article 4.1 of the Constitution).
45. The role of the Constitutional Court *vis-à-vis* the legislative, the executive and the judiciary is to ensure that their actions are in compliance with the Constitution.
46. Further, the Court reiterates that the Constitution provides to the Judges of the Court immunity for decisions made or opinion expressed within the scope of their mandate. In fact, Article 117 [Immunity] of the Constitution provides that “*Judges of the Constitutional Court shall be immune from prosecution, civil lawsuit and dismissal for actions taken, decisions made or opinions expressed that are within the scope of their responsibilities as Judges of the Constitutional Court.*”
47. The Court also refers to its case law where it held that, “*According to constitutional theory and practice, different legal systems recognize and implement two categories of, or sides to, the concept of parliamentary immunity. The first category is non-liability in judicial proceedings of any nature over the opinions expressed, votes cast or decisions taken in their work as deputies and other actions taken while performing their duties. This type of immunity extends after their mandate comes to the end and it is of unlimited duration. They will never be liable to answer to anyone or any court for such actions or decisions. This is clearly provided for by the Constitution of Kosovo. This is functional immunity.*” (See Case KO98/11, Applicant: *The Government of the Republic of Kosovo*, Judgment of 20 September 2011). This functional immunity also guarantees the independence of the Court.
48. The Court reminds that, “*In the performance of their judicial function, judges are independent under the law, and their decisions should not be the subject of any revision outside appeals procedures as provided for by law. The executive and legislative powers should ensure that judges are independent, and that*

steps are not taken which could endanger the independence of judges. It should also be stressed that judges are independent in the public interest.” (See “The Relationship between Ombudsmen and Judicial Bodies”, Conference of national ombudspersons from European countries, held in Ljubljana in 2001).

49. The Court recalls that the main allegation of the Applicant for reconsidering Case KO155/14 is the lack of quorum when the Resolution was adopted.
50. The Court reminds that Article 22 of the Law regulates the procedure which the Court has to follow when deciding on admissibility and inadmissibility of Referrals.
51. In fact, after a Referral having been assigned by the President of the Court to a Judge Rapporteur and a Review Panel of three Judges, the Judge Rapporteur presents a Report to the Review Panel on the inadmissibility of the Referral. The Review Panel discusses it and recommends to the Court the inadmissibility of the Referral. No further deliberation and voting takes place.
52. At this stage of the proceedings as no further deliberation and voting takes place, no quorum of seven (7) judges is required by the Law. The procedure takes place between the Judge Rapporteur and the Review Panel of three judges, who are present, deliberate and vote.
53. If the proposed inadmissibility of the Referral is unanimously endorsed by the Review Panel, then a Resolution on Inadmissibility is submitted to all the Judges.
54. Further, according to Article 22, paragraphs 8 and 9, the Judges who are not members of the Review Panel, within 10 days after the submission of the draft Resolution, can oppose the proposal of inadmissibility. The Resolution is adopted if no Judge from the Court objects to the inadmissibility.
55. When adopted, the Judge Rapporteur and the President of the Court sign the Resolution on Inadmissibility which is published and becomes final.
56. The Court recalls Article 22, paragraphs 6 to 9, of the Law which provides:

[...]

6. The Review Panel assesses the admissibility of the referral. The Review Panel is composed of three judges appointed by the President of the Constitutional Court according to the procedure established in the Rules of Procedure.

7. If the Review Panel unanimously concludes that the referral does not meet formal requirements for further proceeding and is therefore inadmissible, the panel sends to all judges a draft decision that rejects the referral due to the lack of admissibility. The Review Panel shall take all necessary measures to ensure that a copy of the draft decision is effectively sent to judges who may not be on the territory of the Republic of Kosovo.

8. *If, within a period of ten (10) days from receiving the draft decision, judges who are not members of Review Panel do not oppose the draft decision, then the President of the Constitutional Court signs and issues the decision rejecting the claim on the basis of inadmissibility.*

9. *If the Review Panel concludes that the claim is admissible, or if one or more of the judges not on the Review Panel opposes the draft decision to reject the claim, the case shall be referred to the Court. The Court during the oral hearing then considers admissibility and the grounds for the claim in its entirety and decides according to the provisions of this law.”*

57. The Court specifies that Case KO155/14 was preliminary discussed on 27 October 2014 and on 4 November 2014 the Review Panel unanimously approved the Report of Judge Rapporteur and the Draft Resolution on Inadmissibility.
58. On the same date the Resolution on Inadmissibility was sent for ten (10) days comments to all the Judges pursuant to Article 22, paragraphs 7 and 8 of the Law. After the time elapsed for objections against Resolution on Inadmissibility, it was signed by the President of the Court and the Judge Rapporteur. It was published in the Official Gazette on 17 November 2014.
59. Consequently, the procedure followed in Case KO155/14 was in conformity with Articles 19 and 22 of the Law.
60. Therefore, the Court emphasizes that its decision related to Referral KO155/14 is final and binding on the judiciary and all persons and institutions of the Republic of Kosovo, pursuant to Article 116.1 [Legal Effect of Decisions] of the Constitution.
61. The Court recalls that the Decree of the President of the Republic of Kosovo is constitutional as it was issued based on international obligations between the Republic of Kosovo and the European Union as defined in a bilateral agreement. The constitutionality of the content of this Agreement cannot be reviewed by the Court. (See, Case KO95/13, Applicant: *Visar Ymeri and 11 other deputies of the Assembly of the Republic of Kosovo*, Judgment of 9 September 2013).
62. The content of the Decree of the President of the Republic of Kosovo is determined by the bilateral agreement between the Republic of Kosovo and the European Union. The Decree was ratified by 2/3 majority of the Assembly of the Republic of Kosovo. It is a constitutional obligation of the President of the Republic of Kosovo to transfer the text, as it is, from the bilateral agreement into her Decree and to execute it through her Decree.
63. The Decree of the President of the Republic of Kosovo was declared compatible with the Constitution. Thus, the question of the constitutionality of the Decree of the President of the Republic of Kosovo has become *res judicata*.

64. In these circumstances, the Court recalls that it has already decided on Case KO155/14. It had concluded that the Decree of the President of the Republic of Kosovo was declared compatible with the Constitution.
65. Based on the foregoing, the Court rejects Referral KO22/15 as manifestly ill-founded, pursuant to Article 29 of the Law and Rule 36 (1) (d) and (2) of the Rules of Procedure.

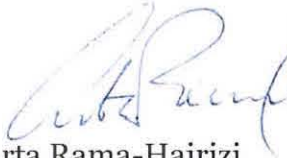
FOR THESE REASONS

The Constitutional Court pursuant to Article 29 of the Law and Rule 36 (1) (d) and (2) and Rule 56 of the Rules of Procedure, on 30 April 2015, unanimously

DECIDES

- I. TO DECLARE the Referral Inadmissible;
- II. TO NOTIFY this Decision to the Applicant and the President of the Republic of Kosovo;
- 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


Arta Rama-Hajrizi



President of the Constitutional Court


Prof. Dr. Enver Hasani