



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

Prishtina, on 2 April 2020
Ref. no.:VVM/1541/20

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DECISION ON EXTENSION OF INTERIM MEASURE

in

Case No. KO219/19

Applicant

The Ombudsperson

Constitutional review of Law No. 06/L-111 on Salaries in Public Sector

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by the Ombudsperson Institution of the Republic of Kosovo (hereinafter: the Applicant).

Challenged law

2. The Applicant challenges the constitutionality of Law No. 06/L-111 on Salaries in Public Sector (hereinafter: the Challenged Law), published in the Official Gazette of the Republic of Kosovo (hereinafter: Official Gazette), on 1 March 2019, which entered into force nine (9) months after its publication in the Official Gazette, namely on 1 December 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Law, which the Applicant claims to be incompatible with paragraph 2 of Article 3 [Equality Before the Law], 4 [Form of Government and Separation of Power], paragraph 1 of Article 7 [Values], 10 [Economy], 21 [General Principles], paragraph 1 of Article 22 [Direct Applicability of International Agreements and Instruments], 23 [Human Dignity], 24 [Equality Before the Law], 46 [Protection of Property], 55 [Limitations on Fundamental Rights and Freedoms], paragraphs 3 and 7 of Article 58 [Responsibilities of the State], paragraph 2 of Article 102 [General Principles of the Judicial System], paragraph 1 of Article 109 [State Prosecutor], 119 [General Principles] paragraphs 1 and 2 of Article 142 [Independent Agencies], 130 [Civilian Aviation Authority] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 1 of Protocol No. 1 of the European Convention on Human Rights (hereinafter: the ECHR), and paragraph 2 of Article 23 of the Universal Declaration of Human Rights.
4. The Applicant also requests the Constitutional Court of the Republic of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure for “*immediate suspension*” of the challenged Law.

Legal basis

5. The Referral is based on sub-paragraph 1 of paragraph 2 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution; Articles 22 [Processing Referrals], 27 [Interim Measures], 29 [Accuracy of the Referral] and 30 [Deadlines] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law); and Rules 32 [Filing of Referrals and Replies], 56 [Request for Interim Measures], and 57 [Decision on Interim Measures] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court after the approval of the interim measure

6. On 12 December 2019, the Judge Rapporteur recommended to the Court the approval of interim measure. On the same date, the Court, with majority of votes, decided to suspend in entirety the implementation of the challenged Law, until 30 March 2020 (See the operative part of the Decision of the Constitutional Court on imposition of interim measure, KO219/19, of 12 December 2019).

7. On 23 December 2019, the Ministry of Public Administration submitted its comments regarding Referral KO219/19 in response to the Applicant's allegations and the specific allegations raised in the Referral.
8. On 14 January 2020, the Court sent a request to the Venice Commission to submit an Opinion in capacity of *Amicus Curiae* regarding case KO219/19.
9. On 23 January 2020, the Applicant notified the Court that several requests were submitted to the Ombudsperson Institution for "*revocation of the Decision on Interim Measure of the Constitutional Court KO219/19, of 12 December 2019, on suspension of the Law on Salaries*". On that occasion, the Applicant notified the Court about that regarding this matter: "*The Ombudsperson has received requests from 17 municipalities, with 266 educational institutions and 7.047 thousand signatures*". The Applicant submitted all these requests to the Court stating he is forwarding them to the attention of the Court, but without explaining or clarifying what is the specific request to the Court in relation to the documents forwarded.
10. On 30 January 2020, the United Trade Union of Education, Science and Culture, the Federation of Health Trade Unions (hereinafter: SBASHK), the Police Trade Union, the Independent Trade Union of Kosovo Customs and the Firefighters' Trade Union, submitted to the Court a "*Request for revocation of the interim measure (suspension) of the Law on Salary*". The trade unions in question stated that they submitted the Referral in accordance with Article 32 [Right to Legal Remedies] of the Constitution and paragraph 11 of Rule 57 [Decision on Interim Measures] of the Rules of Procedure. The trade unions in question also notified the Court about their communication with the Ombudsperson Institution.
11. On 3 February 2020, the Venice Commission sent to the Court several documents and opinions of the Venice Commission concerning the salaries of judges and the Ombudsperson, notifying the Court that this case is more appropriate for the Venice Commission Forum than for an *Amicus Curiae* Opinion. In this regard, the Venice Commission recommended the Court to refer to the Venice Commission Forum, where the constitutional and supreme courts are the members of the Venice Commission, to obtain a more detailed comparative information regarding the issue dealt with in case KO219/19.
12. On 6 February 2020, the Court requested the Applicant to clarify the documents submitted by the Ombudsperson on 23 January 2020 and what specifically the Court is required to take in relation to the documents forwarded. In the request of the Court addressed to the Applicant, the Court explained, *inter alia*, that:

"[...] the only party in the case KO219/19 is the Ombudsperson Institution, as a party that has filed a referral with the Constitutional Court requesting a thorough assessment of the constitutionality of the said Law and its entire suspension. All others, including the aforementioned trade unions, may only have the status of an interested party but not a "party" within the meaning of the aforementioned provisions of the Rules of Procedure [Rule 57 of the Rules of Procedure].

[...] We note that the documents you have forwarded to the Constitutional Court, have in fact been addressed to you and it is the Ombudsperson Institution, the body that should review the documents addressed to the Ombudsperson and decide what step you want to take in relation to those requests. If the Ombudsperson Institution considers that a request for “revocation of an interim measure” should be made, then the Institution you run must file a specific and reasoned request, in accordance with the relevant constitutional and legal provisions, and with the necessary clarifications what concrete action is required to be taken by the Constitutional Court. It follows that, in order to set the Constitutional Court in motion, it is not sufficient to simply forward the requests of other interested parties without the necessary clarification regarding the documents and files submitted to the Court.”

13. On 13 February 2020, the Judge Rapporteur, after consulting the judges of the Court and following the recommendation of the Venice Commission to address the Venice Commission Forum, addressed the following questions regarding the case KO219/19:

“(1) How the issue of salaries in the public sector is regulated in your respective countries, in relation to the principle on “separation of powers” and “checks and balances” between the different government branches? Has your Court dealt with any case in which these two principles were discussed in relation to salaries in public sector?

(2) Has your Court dealt with any cases in which issues related to the “organisational, functional and financial independence” of public institutions were discussed and decided upon?

(3) According to your Constitution, your laws and case-law (if applicable), is the Parliament authorized with the competence to deny budgetary independence and internal job-position categorization to public institutions that used to enjoy such independence with previously existing laws?

(4) Do you recall any instances in your country in which the salaries of the judiciary or other public institutions have been lowered and if that happened, what were the circumstances and rationale for such decrease? In this aspect:

a) do you have any relevant practice which shows how such lowering of salaries impacts the independence of the judiciary and other constitutionally independent institutions;

b) do you have any relevant practice in which you have analysed the applicability of Article 1 of Protocol no. 1 to the ECHR (protection of property) in relation to already acquired rights and the manner in which such rights may be modified by the Parliament?

c) do you have any relevant practice which shows that the regulation of salaries and remunerations must follow constitutional specificities of certain public institutions within the meaning of institutional independence?”

14. Between 14 February 2020 and 12 March 2020, the Court received a response from the liaison officers of the Venice Commission, recommending that, in the circumstances of the present case, the following documents and opinions of the Venice Commission should be analyzed and used, as well as the following cases of various international and constitutional courts:
- (i) *Amicus curiae* to the Constitutional Court of North Macedonia regarding the amendment and supplementation of certain laws relating to the system of salaries and allowances for elected and appointed officials CDL-AD (2010)038 – the relevant part on the lowering of the salaries of judges;
 - (ii) Opinion CDL-AD (2002) 008 on Bosnia and Herzegovina regarding Ombudsperson status – the relevant part discussing the salary of the Ombudsperson and judges;
 - (iii) Opinion CDL-AD (2004) 006 on Bosnia and Herzegovina regarding Ombudsperson status – the relevant part on the issue of the Ombudsperson’s independence and his salary;
 - (iv) Opinion CDL-AD (2019)005, known as “The Principles of Venice” for the Protection and Promotion of the Ombudsperson Institution – the part relevant to the Ombudsperson staff and employment issues of the Ombudsperson staff;
 - (v) Check-list for principle of the Rule of Law CDL-AD (2016)007;
 - (vi) The case of the European Court of Justice, with reference no. ECJ-2018-1-003;
 - (vii) The case of the European Court of Human Rights, with reference no. ECH-2017-3-006;
 - (viii) Cases of the Constitutional Court of Portugal, with reference no. POR-2015-3-018, POR-2013-3-018; POR-2013-1-006; POR-2012-2-011;
 - (ix) The case of the Constitutional Court of Cyprus, with reference no. CYP-2014-2-001;
 - (x) The case of the Constitutional Court of Andorra, with reference no. AND-2014-2-001;
 - (xi) Cases of the Czech Constitutional Court, with reference no. CZE-2011-2-007; CZE-2010-1-003;
 - (xii) The case of the Constitutional Court of Slovenia, with reference no. SLO-2009-3-006;
 - (xiii) The case of the Constitutional Court of Poland, with reference no. POL-2001-H-001;
 - (xiv) The case of the Supreme Court of Canada, with reference no. CAN-1997-3-005
15. Within the aforementioned dates, in addition to the aforementioned documents, opinions and cases proposed by the liaison officers of the Venice Commission, the Court has also received nine (9) direct replies from nine (9) constitutional/supreme members of the Forum of the Venice Commission, namely from: the Federal Constitutional Court of Germany, the Constitutional Court of North Macedonia, the Constitutional Court of Moldova, the Supreme Court of Sweden, the Constitutional Court of Croatia, the Supreme Court of Mexico, the Constitutional Court of Slovakia, the Constitutional Tribunal of Poland, the Constitutional Court of South Africa. All of these courts have

clarified their constitutional legislation as well as their case law on the matters relating to the allocation of salaries in the public sector to various officials, employees and servants of the public sector.

16. On 14 February 2020, the Applicant responded to the Court's request for clarification of 6 February 2020 concerning the Ombudsperson submissions to the Court on 23 January 2020 as well as the documents submitted by several trade unions on 30 January 2020. The Applicant clarified the following: "*In this case, SBASHK, as an interested third party, has requested us to process these requests before the Constitutional Court, and as a result of these claims on 23 January 2020, we have forwarded such requests for notification to the Constitutional Court*". The Applicant neither stated nor requested the revocation of the interim measure but upheld his first request for the imposition of an interim measure and for a complete suspension of the implementation of the challenged Law.
17. On 29 March 2020, the Court notified the abovementioned trade unions that the Court received their documents and they will be reviewed within the Referral submitted by the Ombudsperson as the party that has filed Referral KO219/19.
18. On 30 March 2020, the Judge Rapporteur recommended to the Court the extension of the interim measure to continue the suspension of the application of the challenged Law on two grounds which are reflected in the remaining part of this Decision on the extension of the interim measure (see paragraphs XX) of this Decision).
19. On the same date, the Court, unanimously, decided to approve the extension and interim measure decided by the Court on 12 December 2019 until 30 June 2020 and, consequently, to suspend the applicability of the challenged Law until that date, or until the Court decides on the present case.

As to the extension of interim measure

20. The Court refers to its Decision on Interim Measure of 12 December 2019. All of the constitutional and legal grounds cited for the imposition of interim measures continue to be applicable even now and, accordingly, the Court invokes the reasoning set out in its initial Decision on imposition of the interim measure. (See, Decision on Interim Measure in Case KO219/19, cited above).
21. The Court further notes that after the imposition of the interim measure, various interested parties on the admissibility and merits of this Referral have submitted a considerable volume of documents and comments, to which the Court should pay attention and deal with them in relation to the allegations made. This is the first reason why the extension of the interim measure for an additional period of time is necessary.
22. The second reason for the extension of the interim measure is the extremely large volume of materials received by the Venice Commission and the constitutional/supreme courts as integral part of the Venice Commission

Forum. All these materials, including the legislative and judicial practice submitted by the member courts of the Venice Commission Forum, must be analyzed so that the Court can apply them in the circumstances of the present case, to the extent applicable.

23. In the light of the foregoing reasons, the Judge Rapporteur proposed to the Court to adopt her proposal for the extension of the interim measure, a proposal that was unanimously approved by the judges of the Court.
24. Therefore, without prejudice to any further decision to be taken by the Court in the future as to the admissibility or merits of this Referral, the Court decides to extend the interim measure until 30 June 2020.

FOR THESE REASONS

The Court, in accordance with Article 116.2 of the Constitution, Article 27 of the Law and Rule 57 of the Rules of Procedure, on 30 March 2020, unanimously,

DECIDES

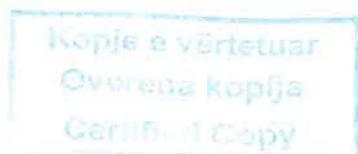
- I. TO EXTEND the interim measure decided by the Decision on Interim Measure in case KO219/19 of 12 December 2019, until 30 June 2020;
- II. TO CONTINUE SUSPENSION of the implementation in entirety of Law No. 06/L-111 on Salaries in Public Sector in the duration specified in item I;
- III. This decision will be notified to the parties;
- IV. This decision will be published in accordance with Article 20.4 of the Law;
- V. This decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Remzije Istrefi-Peci

Arta Rama-Hajrizi



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