



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

Prishtina, 7 May 2020
Ref. no.: VMP1564/20

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DECISION ON INTERIM MEASURE

in

Case No. KO72/20

Applicant

Rexhep Selimi and 29 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020

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 is submitted by: Rexhep Selimi, Yllza Hoti, Liburn Aliu, Fatmire Mulhaxha Kollçaku, Arbërie Nagavci, Hekuran Murati, Fitore Pacolli, Hajrullah Çeku, Saranda Bogujevci, Jahja Koka, Mefail Bajçinovci, Valon Ramadani, Mimoza Kusari Lila, Fitim Uka, Shpejtim Bulliqi, Artan Abrashi, Arbër Rexhaj, Arbëresha Kryeziu Hyseni, Labinotë Demi Murtezi, Alban Hyseni, Gazmend Gjyshinca, Arta Bajraliu, Enver Haliti, Agon Batusha, Dimal Basha, Fjolla Ujkani, Fitim Haziri, Elbert Krasniqi, Eman Rrahmani, Salih Zyba (hereinafter: the Applicants), all deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

Challenged act

2. The Applicants challenge Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020 (hereinafter: the Decree) by which Mr. Avdullah Hoti, is proposed to the Assembly of the Republic of Kosovo as a candidate for the Prime Minister to form the Government of the Republic of Kosovo.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged act, which according to the Applicant's allegations is not in compliance with paragraph 1 of Article 4 [Form of Government and Separation of Power], paragraph 2 of Article 82 [Dissolution of the Assembly], paragraph 14 of Article 84 [Competencies of the President] as well as Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).
4. The Applicants request the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure "*on the Decree in order to prevent unrecoverable damage to the party and the institution*".
5. The Applicants also request the holding of the public hearing.

Legal basis

6. The Referral is based on Article 113, paragraph 2, sub-paragraph 1 [Jurisdiction and Authorized Parties] of the Constitution, Articles 29 [Accuracy of the Referral] and 30 [Deadlines] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), as well as Rules 32 [Filing of Referrals and Replies] and 67 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo, No. 01/2018 (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 30 April 2020, about 17:00 hrs, the Applicants submitted the Referral to the Court.

8. On the same date, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Gresa Caka-Nimani and Radomir Laban (members).
9. On the same date, the Court, through electronic mail, notified the Applicants about the registration of the Referral.
10. On the same date, the Court notified the President of the Republic of Kosovo about the registration of the Referral (hereinafter: the President); the President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly), who was requested to submit a copy of the Referral to all deputies of the Assembly; the Acting Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister); as well as the Ombudsperson.
11. The Court notified all interested parties mentioned above that their comments: (i) regarding the request for the imposition of an interim measure, if any, taking into account the urgency of the case, to present them to the Court, by 1 May 2020, at 12:00 hrs; while (ii) the comments regarding the merits of the Referral, if any, to submit to the Court no later than 8 May 2020, at 16:00 hrs.
12. On 1 May 2020, before 12:00 hrs, the Court received a letter from the Head of the Parliamentary Group of the Serbian List, the deputy Slavko Simić, requesting the Court to provide additional deadline to submit comments on interim measure because they received Referral KO72/20 only in Albanian.
13. On the same date, the Court responded to the deputy Slavko Simić by notifying him that the Referral KO72/20 was received in the Court only in the Albanian language and that the Court sent it for urgent translation immediately after its receipt. The Court sent the full copy of the Referral in Serbian to the deputies in question. The Court also approved their request for an extension of the deadline for submitting comments for an interim measure until 16:00 hrs on 1 May 2020.
14. On 1 May 2020, within the set deadline, the Court received comments regarding the interim measure from the following parties: the President, the President of the Assembly, the Prime Minister, the Parliamentary Group of the Democratic League of Kosovo, the deputy Arban Abrashi and the deputy Shkëmb Manaj.
15. On 1 May 2020, the Judge Rapporteur recommended to the Court the approval of the interim measure. On the same date, the Court, by majority of votes, decided to approve the interim measure until 29 May 2020, namely to suspend the further implementation of the challenged Decree of the President.

Summary of facts

16. On 6 October 2019, the early parliamentary elections were held.

17. On 27 November 2019, the CEC certified the election results for the Assembly, based on the following list of the election results:
 - a. VETËVENDOSJE! Movement, 29 deputies;
 - b. Democratic League of Kosovo, 28 deputies;
 - c. Democratic Party of Kosovo, 24 deputies;
 - d. AAK-PSD Coalition 100% Kosovo, 13 deputies;
 - e. Srpska Lista, 10 deputies;
 - f. Social Democratic Initiative – Alliance Kosova e Re, Justice Party, 6 deputies;
 - g. “Vakat” Coalition, 2 deputies;
 - h. Kosova Demokratik Tyrk Partisi, 2 deputies;
 - i. Egyptian Liberal Party, 1 deputy;
 - j. Nova Demokratska Stranka, 1 deputy;
 - k. Ashkali Party for Integration, 1 deputy;
 - l. New Democratic Initiative of Kosovo, 1 deputy;
 - m. Jedinstvena Goranska Partija, 1 deputy;
 - n. Kosovo United Roma Party, 1 deputy.
18. On 26 December 2019, the Assembly was constituted.
19. On 20 January 2020, the President issued the Decree by which Mr. Albin Kurti was proposed to the Assembly as a candidate for Prime Minister to form the Government.
20. On 3 February 2020, the Assembly elected the Government with Prime Minister Mr. Albin Kurti.
21. On 20 March 2020, a number of deputies of the Assembly submitted to the Presidency of the Assembly the no-confidence motion against the Government.
22. On 25 March 2020, the Assembly approved the no-confidence motion against the Government.
23. After this date, the Court notes that there have been exchanges of communications over the appointment of a mandate holder for the formation of the Government. [*Clarification of the Court: all communications and exchanges of the letters in question shall be reflected in the final decision of the Court*].
24. On 30 April 2020, the President rendered the challenged Decree which contains three points, as follows:
 - “1. *Mr. Avdullah Hoti, is proposed to the Assembly of the Republic of Kosovo as a candidate for Prime Minister to form the Government of the Republic of Kosovo.*
 2. *The candidate under item I of this Decree, no later than fifteen (15) days after the appointment, submits the composition of the*

Government to the Assembly of the Republic of Kosovo and requests the approval by the Assembly.

3. *The Decree enters into force on the date of signing”.*

25. The abovementioned Decree of the President is stated to have been issued based on:
- (i) paragraphs (4) and (18) of Article 84 [Competencies of the President] of the Constitution and Article 95 [Election of the Government] of the Constitution;
 - (ii) Article 6 of Law No. 03/L-094 on the President of the Republic of Kosovo;
 - (iii) Judgment of the Constitutional Court in case KO103/14 of 1 July 2014; and
 - (iv) in the course of the proposal of the Democratic League of Kosovo, accepted by the Office of the President on 30 April 2020.

Applicant’s allegations

26. The Applicants allege that the challenged Decree of the President is not in compliance with paragraph 1 of Article 4 [Form of Government and Separation of Power], paragraph 2 of Article 82 [Dissolution of the Assembly], paragraph 14 of Article 84 [Competencies of the President] as well as Article 95 [Election of the Government] of the Constitution. The Applicants oppose the challenged Decree in entirety. *[Clarification of the Court: all allegations of the Applicants regarding the admissibility of the Referral and its merits will be presented in detail in the final decision of the Court. In this Decision on Interim Measure, the Court has focused only on the request for an interim measure].*

Regarding the request for imposition of interim measure

27. Regarding the interim measure, the Applicants state that *“the interim measure [...] is in the public interest, because an action of the Assembly based on the unconstitutional decree of the President [...] would cause irreparable damage to the party, because: a) The Government to be voted on the basis of this decree would take decisions that affect the public interest which would then be declared null if the decree itself is unconstitutional; b) The Government should use public resources/budget, the use which would be unlawful; c) The Government could take actions and measures that affect the constitutional rights of citizens, due to pandemics; d) If with the scenario that the Government is voted based on this decree no. 24/2020 and after one or two or three months, for example, the election of the Government is declared unconstitutional, from that moment that government must stop every activity. In that situation, no Government would be in office, and Kosovo could not stay without the caretaker Government until new elections, so it is necessary that prior to the vote of the Government, the compliance with the Constitution of that procedure is known”* further emphasizing possible economic and international implications, as well as harming the public interest.

28. To support their arguments, they also refer to the case of the Court KO119/14 where the Court issued an interim measure to suspend the decision to elect the President of the Assembly, arguing that in the case of the election of the Government, the risk of damage and public interest is even bigger.
29. Therefore, the Applicants consider that the Referral has met the criteria set by the constitutional and legal provisions which have been materialized through the decisions of the Court that their Referral be considered admissible *prima facie* and the Court to impose interim measures.
30. Therefore, taking into account the arguments presented in the content of this Referral and pursuant to Article 27 paragraph 1 of the Law on the Constitutional Court, the Applicants request the Constitutional Court to decide on the imposition of an interim measure on the suspension of the legal effect of the challenged Decree in order to prevent irreparable damage to the party and the institution, as well as to protect the public interest.

Comments received regarding the interim measure

31. Within the deadline given by the Court, namely until 1 May 2020 at 12:00 hrs, the comments regarding the Applicants' request for the imposition of an interim measure regarding the challenged act, have been submitted by: the President, the President of the Assembly, the Prime Minister, the Parliamentary Group of the Democratic League of Kosovo, the deputy Arban Abrashi and deputy Shkëmb Manaj. The Court will present in a summarized manner their positions in the following.
32. The President, in his comments regarding the Referral justifies, among other things, that the Applicants' Referral regarding the imposition of the interim measure does not meet the legal requirements for the imposition of the interim measure, namely the Applicants have not indicated that the case is *prima facie* admissible, have not proved that with the implementation of the challenged act will suffer irreparable damage and if the imposition of the interim measure would be in the public interest. The President presented his position that the Applicants' Referral does not provide arguments proving that the challenged Decree is not in compliance with the Constitution. He also emphasized that the formation of "*a government that has the legitimacy to take important decisions about governing the country [...] would be in the public interest*". This is, according to him, by taking the measures that must be taken urgently regarding pandemics COVID-19, but also taking into account the fact that in the field of international relations "*only a Government with legitimacy from the Assembly, may represent the interests of the Republic of Kosovo inside the country and abroad [...]*." Therefore, the President requests that the request for an interim measure be rejected.
33. In her comments regarding the request for an interim measure, the President of the Assembly reasons, *inter alia*, that an interim measure is necessary given the complexity of the constitutional procedure for forming the government and the uncertainties over this procedure. She further justifies the imposition of an

interim measure because only in this way it will be guaranteed that the Assembly of Kosovo, as the highest institution in our political system, will not take decisions that may result unconstitutional, and consequently would seriously damage the public trust and the very integrity of this institution.

34. In his response regarding the request for an interim measure, the Prime Minister stated that the Government considers that the Court should approve the interim measure after the legal criteria have been met, among other things, as the Applicants have proved that the case is *prima facie* inadmissible, and also have proved that the imposition of the interim measure is in the public interest and serves the administration of justice, namely the administration of the case without time pressure. The Prime Minister further adds that the interim measures have always been imposed by the Court in case the main positions of state institutions have been challenged before it.
35. The Parliamentary Group of the Democratic League of Kosovo in their response emphasize that the legal requirements for the imposition of the interim measure have not been met. They especially emphasize the fact that it is not necessary to impose an interim measure because according to the Court's practice, even if the challenged act was declared unconstitutional, then the Court could decide that the effect of the decision would be for the future and it would not have a retroactive effect, and therefore, no irreparable damage would be caused.
36. The deputy Arban Abrashi in his response to the request for an interim measure requests the Court to reject the request for an interim measure and to open the way for the establishment of a legitimate Government and with the support of the representatives of the sovereign, so that the new Government be able to perform the functions and expectations that the country's economy has in these days of urgency and need. According to him, any postponement of the deadline and at the same time the establishment of the new Government with full constitutional capacities increases the economic damage, causes serious economic consequences and even irreparable damage to the economy and Kosovar society.
37. The deputy Shkëmb Manaj, regarding the request of the Applicants for the imposition of the interim measure, states that taking into account the fact that the granting of the interim measure is necessary to avoid irreparable risks or damage, or if the granting of these measures is in the public interest, in the present case, not that these legal criteria for imposing the interim measure are not met, but on the contrary, imposing the interim measure would cause irreparable damage and would be in full contradiction with the public interest, because, among other things, the dismissed Government does not have the capacity to take legal initiatives and as a result, cannot manage the state of emergency in the country due to COVID-19 pandemic. Therefore, he requests the Court to reject the request for the imposition of an interim measure.

Assessment of the request for interim measure

38. In order to assess the request for interim measure, the Court first examines whether the Referral has fulfilled the relevant requirements, established in the Constitution and further specified in the Law and the Rules of Procedure.
39. Initially, the Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provides that “*The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties*”.
40. In addition, the Court refers to Article 113.2 (1) of the Constitution, which states that:

“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;”

41. In this regard, the Court also refers to Articles 29 [Accuracy of the Referral] and 30 [Deadlines] of the Law which stipulate that:

Article 29 Accuracy of the Referral

1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (1/4) of the deputies of the Assembly of the Republic of Kosovo, [...].

2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution.

3. A referral shall specify the objections put forward against the constitutionality of the contested act.

Article 30 Deadlines

A referral made pursuant to Article 29 of this Law shall be filed within a period of six (6) months from the day upon which the contested act enters into force.

42. The Court also refers to Rule 67 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure, which establishes:

“(1) A referral filed under this Rule must fulfill the criteria established under Article 113.2 (1) and (2) of the Constitution and Articles 29 and 30 of the Law.

(2) When filling a referral pursuant to Article 113. 2 of the Constitution, an authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution.

(3) The referral shall specify the objections put forward against the constitutionality of the contested act.

(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act”.

43. The Court also refers to paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, which provides:

“[...]

2. While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages”.

[...]”

44. The Court also refers to Article 27 [Interim Measures] of the Law, which provides:

“1. The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.

2. The duration of the interim measures shall be reasonable and proportionate”.

45. Finally, the Court recalls Rule 57, paragraphs (4) and (6) of the Rules of Procedure, which specify:

Rule 57 (4) of the Rules of Procedure

[...] Before the Review Panel may recommend that the request for interim measures be granted, it must find that:

(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;

(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and

(c) the interim measures are in the public interest
[...]

Rule 57 (6) of the Rules of Procedure

“[...] If the request for interim measures has made this necessary showing either in whole or in part, the Court shall grant the request, stating the facts and the legal reasons supporting the decision and the time during which the interim measures will be effective. No decision granting interim measures may be taken unless the expiration date is specified; however, expiration dates may be extended by further decision of the Court [...]”.

46. In light of the abovementioned normative framework, in order to impose an interim measure, it is required that the submitting party first shows the *prima facie* case on the merits of the Referral.
47. Regarding this criterion, the Court considers that the Applicants have managed to show *prima facie* case before the Court through the allegations filed in the Referral and their reasoning.
48. In addition to the first procedural criterion, elaborated above, the Law and the Rules of Procedure provide for two other bases on which the interim measure can be imposed. The first basis concerns the requirement that the party seeking the interim measure be able to prove that the interim measure is necessary “to avoid unrecoverable risks or damage”. While the second basis has to do with argumentation, namely the finding that the interim measure is in “public interest”.
49. In this regard, the Court considers that the Applicants’ Referral raises a number of issues at the constitutional level regarding the democratic functioning of the constitutional institutions of the Republic of Kosovo and the separation of powers. Such issues, without imposing an interim measure, have the potential to cause irreparable damage in terms of the constitutional order of the Republic of Kosovo and the functioning of key institutions in the Republic of Kosovo - within the meaning of Article 116, paragraph 2 of the Constitution, Article 27, paragraph 1 of the Law and Rule 57, paragraph (4) item (b) of the Rules of Procedure. The Court, therefore, finds that the Applicants have proved that the approval of the request for an interim measure is necessary to avoid irreparable risks or damage.
50. Furthermore, the Court considers that the constitutional issues filed in this Referral regarding the observance and implementation of constitutional provisions governing the democratic functioning of institutions established by the Constitution and the separation of powers are of such importance and nature that they inevitably make the suspension of implementation of the challenged Decree, an issue of public interest. Therefore, the Court considers that there are substantial reasons of the public interest nature within the meaning of Article 27 of the Law and Rule 57, paragraph 4, item (c), of the

Rules of Procedure, justifying the adoption of the interim measure concerning the challenged Decree. In this regard, the Court finds that the approval of the request for an interim measure is of public interest to the Republic of Kosovo and its citizens and necessary for the protection of the public interest.

51. Therefore, the Court, without any prejudice to the admissibility or merits of the Referral, concludes that the Applicants' request for interim measure regarding the challenged Decree of the President must be approved in accordance with the reasoning of this Decision.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 116.2 of the Constitution, Article 27 of the Law and Rule 57 of the Rules of Procedure, on 1 May 2020, by majority of votes

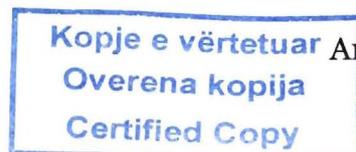
DECIDES

- I. TO APPROVE interim measure in duration until 29 May 2020, from the date of issuance of this Decision;
- II. TO IMMEDIATELY SUSPEND the implementation of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020, in the duration established in item I of this enacting clause;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in accordance with Article 20.4 of the Law; and
- V. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Nexhmi Rexhepi



Arta Rama-Hajrizi

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