



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

Prishtina, on 27 October 2021
Ref. no.:VPM 1882/21

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DECISION ON INTERIM MEASURE
in

Case No. KO127/21

Applicant

Abelard Tahiri and 10 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of Decision No. 08-V-029, of the Assembly of the Republic of Kosovo of 30 June 2021, for the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by eleven (11) deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly), namely: Abelard Tahiri, Eliza Hoxha,

Ganimete Musliu, Blerta Deliu Kodra, Hajdar Beqa, Fadil Nura, Ardian Kastrati, Elmi Reçica, Floretë Zejnullahu, Ariana Musliu Shoshi, Bekim Haxhiu (hereinafter: the Applicants or the Deputies submitting the Referral).

2. The Applicants are represented in the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), by the legal representative Faton Fetahu from Prishtina.

Challenged act

3. The Applicants challenge the Decision of the Assembly of the Republic of Kosovo, No. 08-V-029, of 30 June 2021 (hereinafter: the challenged Decision), for the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo (hereinafter: the Board).

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Decision, which, according to the Applicants, is not in accordance with Article 101 [Civil Service] and Article 142 [Independent Agencies] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).
5. The Applicants state that based on Article 43 (Deadline) of Law No. 03/L-121 on the Constitutional Court (hereinafter: the Law), the challenged Decision is subject to *ex-lege* suspension effect. In this context, the Applicants also refer to (i) paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, which stipulates that while a proceeding is pending before the 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; and (ii) Article 27 (Interim Measures) of the Law, which stipulates that the 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 unrecoverable damages, or if such an interim measure is in the public interest.

Legal basis

6. The Referral is based on paragraph 5 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 (Processing Referrals), 42 (Accuracy of the Referral) and 43 (Deadline) of the Law; as well as Rules 32 (Filing of Referrals and Replies) and 74 (Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 7 July 2021, the Applicants submitted the Referral to the Court challenging the Decision of the Assembly on the dismissal of five (5) members of the Board.
8. On 14 July 2021, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Radomir Laban and Remzije Istrefi-Peci (members).
9. On 16 July 2021, the Court notified the Secretary General of the Assembly of the Republic of Kosovo (hereinafter: the Assembly of Kosovo) about the registration of the Referral and requested from him that by 30 July 2021 to submit to the Court all relevant documents related to the challenged Decision.
10. On 16 July 2021, the Applicants were notified about the registration of the Referral. On the same date, the Court, on the registration of the Referral, notified: the President of the Assembly (hereinafter: the President of the Assembly), who was requested to submit a copy of the Referral to all deputies of the Assembly; the Ombudsperson and the Independent Oversight Board for the Civil Service of Kosovo. The Court notified the above-mentioned interested parties that their comments, if any, must be submitted to the Court, within fifteen (15) days, respectively until 30 July 2021, at the e-mail address of the Court or by personal submission.
11. On the same day, the Court notified the President of the Republic of Kosovo (hereinafter: the President) and the Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister) about the registration of the Referral.
12. On 21 July 2021, the Secretary of the Assembly submitted to the Court the complete file regarding the challenged Decision.
13. On 30 July 2021, deputy Doarsa Kica-Xhelili, a deputy from the Parliamentary Group VETËVENDOSJE!, submitted comments regarding the Referral KO127/21.
14. On 3 August 2021, the Court notified the Applicants of the receipt of comments from deputy Kica-Xhelili, and offered them the opportunity to submit their comments until 13 August 2021. The Applicants did not submit additional comments.
15. On 15 September 2021, the Court requested from the Board additional documents, respectively: (i) a copy of the resignation of Mr. Eshref Shabani from the position of Chairperson of the Board; and (ii) any other relevant document of 8 September 2021, of the extraordinary meeting of this institution, related to the issue of resignation.
16. On 17 September 2021, the Board attached: (i) Board Decision No. 7/2021 of 8 June 2021; (ii) a copy of the minutes of the extraordinary meeting of the Board of 8 June

2021, in which the only item on the agenda was the review of the request of the Chairperson of the Board to resign from this position; and (iii) the decision of the Assembly on the dismissal of 5 (five) members of the Board.

17. On 6 October 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously requested to postpone the case for additional supplementation, as well as regarding the assessment of the interim measure, the receipt of the information from the Assembly regarding the actions taken after the approval of the challenged Decision.
18. On 12 October 2021, the Court requested from the Assembly additional information regarding the actions taken following the challenged Decision.
19. On 13 October 2021, the Assembly responded with the information requested by the Court, informing the Court regarding the announcement of vacancies, respectively the Decision of the Presidency of the Assembly to announce the vacancy for five (5) members of the Board, from 23 August 2021; and the Decision of the Presidency of the Assembly on the re-announcement of the vacancy for five (5) members of the Board from the Albanian community and for two (2) members from non-majority communities from 6 October 2021.
20. On 20 October 2021, the Review Panel considered the proposal of the Judge Rapporteur regarding the decision on the interim measure and requested further supplementation of this draft decision.
21. On 21 October 2021, the Judge Rapporteur recommended to the Court the approval of the interim measure. On the same date, the Court unanimously imposed the interim measure with respect to the challenged Decision until 15 December 2021.

Summary of facts

22. On 8 October 2020, after three rounds of secret ballot, the Assembly by Decision [No. 07-V-063], decided to elect five (5) members of the Board.
23. On 31 March 2021, the Board, based on paragraph 1 of Article 28 (Annual report of the Board) of the Law on Independent Oversight Board for the Civil Service of Kosovo (hereinafter: the Law on Board), addresses the Assembly by presenting the Annual Work Report of the Board for 2020.
24. On 28 April 2021, the President of the Assembly: (i) forwarded the Annual Report of the Board to the deputies of the Assembly; and (ii) assigned the Committee on Public Administration, Local Government, Media and Regional Development (hereinafter: the Committee on Public Administration) and the Committee on Budget, Work and Transfers to review this report and to submit to the Assembly the report with recommendations.

25. On 1 June 2021, the meeting of the Committee on Public Administration was held, whereat with six (6) votes against, was voted against the approval of the Annual Report of the Board for 2020.
26. On 2 and 3 June 2021, the Committee for Public Administration through the Coordination Office of the Committee addressed the Board for providing the information with regard to the cases within the Board.
27. On 15 June 2021, the Committee on Public Administration, by six (6) votes “for” and four (4) “against”, by Recommendation [08/315/Do-213], recommended to the Assembly the dismissal of five (5) members of the Board. In the reasoning of the recommendation it was emphasized that the initiation of the procedure was done according to paragraph 1 of Article 15 (Termination of the Board’s member mandate) of the Law on Board, respectively (i) paragraph 1.1, regarding violations of the provisions of the Law on Board; and (ii) paragraph 1.3, regarding cases of exercising duties that are not in accordance with his/her function.
28. On 30 June 2021, in the plenary session of the Assembly, it was voted on the recommendation of the Committee on Public Administration for the dismissal of five (5) members of the Board. The result of the voting was as follows: sixty two (62) votes “for” the dismissal of the members of the Board, three (3) votes “against” and eleven (11) abstention. Consequently, the Assembly by Decision [No. 08-V-029] dismissed five (5) members of the Board.
29. On 19 July 2021, the Presidency of the Assembly by Decision [No. 08-V-049] decided that from 23 August 2021, to announce the vacancy for five (5) members of the Board, from the Albanian community. Whilst, within the period of twenty-one (21) days, until 13 September 2021, not enough candidates had applied, the Presidency of the Assembly, on 29 September 2021, by Decision [No. 08-V-065], re-announced the public competition for five (5) members of the Board from the Albanian community and for two (2) members from the non-majority communities. The competition was announced on 6 October 2021 and is open until 25 October 2021.

Applicants’ allegations

30. The Applicants allege that the challenged decision of the Assembly in procedural and substantial aspect is contrary to Articles 101 [Civil Service] and 142 [Independent Agencies] of the Constitution.

(i) *Allegations regarding the admissibility of the Referral*

31. The Applicants state that based on Judgment of the Court, KO73/16 (especially paragraphs 43 and 49) and Judgment of the Court, KO171/18, they consider that the challenged Decision raises constitutional issues because it falls within the background of the norms provided by Article 101 [Civil Service] and 142 [Independent Agencies] of the Constitution.

32. The Applicants argue that the Court should interpret the constitutional norms whenever a case is addressed to the Court by the institutions mandated for referral and in the present case, according to the Applicants, in order to protect the public service system, represented by the Board *“members of whose system, indirectly by the contested decision, their legal security has been violated, provided by the Independent Oversight Board for the Civil Service of Kosovo, which has independent responsibility from the Government to protect the principles of public service and the rights of servants (employees) of this system”*. Consequently, the Applicants request that the challenged Decision be considered on its merits.

(ii) Allegations of violation of Articles 101 and 142 of the Constitution

33. The Applicants initially state that paragraph 2 of Article 101 of the Constitution places the Board in the function of an independent institution that must ensure that the standards of merit, professionalism, neutrality to politics and the civil character of the civil service are reflected in the work and activity of the civil service of the state. Consequently, the Applicants state that the Assembly, the Government and other political bodies are stripped of their competencies to ensure the preservation of the professional and civil integrity of the civil service so that this competence is transferred to an independent institution.
34. The Applicants further refer to several Judgments of the Court, arguing that (i) the Decisions of the Board are final and, as such, constitute a valid executive title; and (ii) proceedings before this *quasi-judicial* body must comply with the rules on fair and impartial trial, including the procedure for the execution of the decisions of the Board.
35. The Applicants allege that there is no fact presented in the recommendation of the Parliamentary Committee on Public Administration: (i) that proves that the members of the Board have violated the Law on Board; and (ii) proving that the dismissed members of the Board have carried out activities that present a conflict of interest as defined in Article 15 of the Law on Board; (iii) proving that the dismissed members of the Board have exercised their duties not in accordance with their function, as defined in Article 15 of the Law on Board; (iv) proving that the dismissed members of the Board have been absent from work without a reason for longer than five (5) days for reasons that are not foreseen by the law, as defined in Article 15 of the Law on Board.
36. The Applicants allege that the members of the Board and the Board itself as an independent constitutional body have been subjected to pressure and interference by the Parliamentary Committee on Public Administration, which according to the Applicants proves the tendency to interfere in the independence of this institution.
37. The Applicants state that even according to the Judgment of the Court in case KO171/18, the decisive article in the circumstances of the present case, was assessed in entirety in compliance with the Constitution. Therefore, paragraph 3 of Article 11 (Term of office for members of Board) of the Law on Board states that: “3.

Regarding the decision-making within the constitutional and legal functions of the Board, the Chairperson and members of the Board enjoy immunity from prosecution, civil lawsuit or discharge.”

38. Referring to Judgment of the Court, KO171/18 and in particular paragraph 247 thereof, the Applicants also emphasize paragraph 3 of Article 11 (Term of office for members of Board) of the Law on Board, emphasizing the issue of immunity and citing that “[...] *The purpose of the immunity is that the members of the Board are free to exercise their functions with independence and without fear of the consequences for the performance of their functions [...].*” Applicants as a comparative example, also cite the Decision 29/2011 of the Constitutional Court of Hungary, of 7 April 2011, arguing that civil servants cannot be dismissed without a detailed reasoning being provided in that regard.
39. Finally, the Applicants request the Court to (i) declare the Referral admissible; and (ii) declare the contested decision contrary to the Constitution, and declare the same invalid.

(iii) Concerning the interim measure

40. The Applicants, with regard to the interim measure, request that the Court accept Article 43 of the Law, thus referring to the *ex-lege* suspension effect of the implementation of the law or the decision of the Assembly. The Applicants state that in cases of contested acts of the Assembly based on paragraph 5 of Article 113 of the Constitution, the challenged law or decision is suspended until the final decision of the Court. The Applicants also refer to (i) paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, which stipulates that while a proceeding is pending before the 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; and (ii) Article 27 (Interim Measures) of the Law.
41. Consequently, the Applicants: (i) request the Court to inform the parties involved that the challenged Decision is suspended *ex-lege* and is not sent for enforcement until the final decision of the Court; and (ii) consider that it is not necessary to expressly request the suspension of the application of the act, since the same should by law be subject to the suspension effect in the application, as it has been challenged before this Court, pursuant to paragraph 5 of Article 113 of the Constitution.

Assessment concerning the interim measure

42. In assessing the request for an interim measure, the Court first recalls the constitutional basis on which the relevant request was submitted to the Court.
43. In this regard, the Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which stipulates that “*The Constitutional*

Court decides only on matters referred to the court in a legal manner by authorized parties”.

44. In addition, the Court also refers to paragraph 5 of Article 113 of the Constitution, which stipulates:

“Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed.”

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

“[...]

*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.
[...].”*

46. Further, 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.”

47. Finally, the Court also refers to Article 43 (Deadline) of the part of the Law related to the proceedings in the case set out in Article 113, paragraph 5 of the Constitution, which provides:

1. A law or decision adopted by the Assembly of the Republic of Kosovo shall be sent to the President of the Republic of Kosovo for promulgation after the expiry of the deadline prescribed by Article 113, Paragraph 5 of the Constitution.

2. In the event that a law or decision adopted by the Assembly of the Republic of Kosovo is contested in accordance with Article 113, paragraph 5 of the Constitution, such a law or decision shall be sent to the President of the Republic of Kosovo for promulgation in accordance with modalities determined in the final decision of the Constitutional Court on this contest.

3. In the event that a law or decision adopted by the Assembly is contested in accordance with Article 113, paragraph 5 of the Constitution, the Constitutional Court shall render a final decision on this contest no later than sixty (60) days following the submission of the referral.

48. The Court also recalls Rule 56, paragraph (1) of the Rules of Procedure, which sets out:

“(1) At any time when a referral is pending before the Court and the merits of the referral have not been adjudicated by the Court, any party to the proceeding may request interim measures, or the Court may consider interim measures without a request, as determined by Article 27 of the Law.”

49. Finally, the Court recalls Rule 57, paragraph (4) of the Rules of Procedure, which specifies:

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
[...]*

50. The Court recalls that the circumstances of the respective case are related to the Decision of the Assembly No. 08-V-029, of 30 June 2021, which based on the Recommendation of the Parliamentary Committee on Public Administration has collectively dismissed five (5) members of the Board.
51. The Court recalls that the Referral was submitted by more than 10 (ten) deputies of the Assembly, within 8 (eight) days from the date of approval of the Decision by the Assembly, both for the content and for the procedure followed, as defined in paragraph 5 of Article 113 of the Constitution. Furthermore, the Court considers that the facts and allegations presented by the Applicants in their Referral raise a number of issues at the constitutional level that could have potential consequences for the independence and functioning of the Board, as an independent institution established by the Constitution and which ensures compliance with the rules and principles governing the civil service. Consequently, the Applicants have also demonstrated *prima facie* the admissibility of the Referral.

52. Furthermore, the Court notes that the Applicants state that based on Article 43 of the Law, the challenged Decision of the Assembly is subject to the *ex-lege* suspension effect of the application of the law or the decision of the Assembly. In this regard, the Court recalls that the Applicants, inter alia, requested the Court to inform the parties involved that the challenged Decision is suspended *ex-lege* based on Article 43 of the Law and is not sent for enforcement until the final Decision of the Court.
53. The Court reiterates that Article 43 of the Law stipulates that in the event that a law or decision adopted by the Assembly of the Republic of Kosovo is contested in accordance with Article 113, paragraph 5 of the Constitution, such a law or decision shall be sent to the President of the Republic of Kosovo for promulgation in accordance with modalities determined in the final decision of the Court on this contest.
54. The Court, through its case law, has clarified that in such circumstances, the contested laws or decisions cannot produce effects until the final decision of the Court. For example, in its case, KO108/13, a case in which the deputies requested the constitutional review of the Law No. 04/L-209 on Amnesty, through Article 113 paragraph 5 of the Constitution, following the question of the President of the Republic of Kosovo regarding the clarifications pertinent to the request for the Law on Amnesty, as well as its constitutional obligations, respectively: (i) if it may promulgate the Law on Amnesty; and (ii) if an interim measure were to be imposed, the Court, in a letter communicating with the President, had stated that: (i) the Law on Amnesty has not and it cannot enter into force until the Constitutional Court renders its final decision; (ii) any attempt to publish the Law on Amnesty and, consequently, to begin implementing it in practice, constitutes an unconstitutional, invalid and non-existent act; and (iii) the Law on Amnesty has not and it cannot enter into force until the Constitutional Court renders its decision, and as a consequence the law in question cannot produce any legal effect. (See the case of Court KO108/13, Applicant: *Albulena Haxhiu and 12 other deputies of the Assembly of the Republic of Kosovo*, Judgment of 3 September 2013, paragraphs 9 and 10).
55. However, with regard to the category of decisions of the Assembly, as in the circumstances of the present case, which in procedural aspect after the decision-making in the Assembly in order to produce legal effect does not provide for its sending to the President, the Court clarifies that this category has no *ex-lege* suspension effect. Consequently, in such cases, the Court, when it has assessed that the relevant criteria set out in the Constitution, Law and Rules of Procedure have been met, has approved/imposed the interim measure. (See, inter alia, the case of the Court, KO119/14, Applicant: *Xhavit Haliti and 29 other deputies of the Assembly of the Republic of Kosovo*, Decision on Interim Measure of 23 July 2014).
56. In the circumstances of the present case, the Court considers that the Applicants' Referral raises a number of issues at the constitutional level that might have

potential consequences for the independence and functioning of the Board, as an independent institution established by the Constitution, and which ensures the compliance of the rules and principles governing the civil service. The Court also considers that the suspension of the election of new members of the Board, until the Court decides in a meritorious manner in the present case, constitutes a matter of public interest and is in accordance with the principle of legal certainty.

57. Consequently, the Court considers that, in the circumstances of the present case, the imposition of an interim measure *ex officio* is in the public interest, in terms of paragraph 2 of Article 116 of the Constitution, paragraph 1 of Article 27 of the Law and paragraph 1 of the Rule 56 of the Rules of Procedure, which justify the imposition of an interim measure in relation to the challenged Decision.
58. The Court concludes that the imposition of an interim measure in relation to the challenged Decision of the Assembly does not prejudice the admissibility and merits of the Referral.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, pursuant to Article 116.2 of the Constitution, Article 27 of the Law and Rule 56.1 of the Rules of Procedure, on 21 October 2021, unanimously

DECIDES

- I. TO IMPOSE the interim measure for the duration until 15 December 2021;
- II. TO IMMEDIATELY SUSPEND the Decision No. 08/V-029 of the Assembly of the Republic of Kosovo regarding the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo, for the duration defined in point I;
- III. The Assembly must refrain from any action on the issue of electing new members until the final decision of the Court;
- IV. TO NOTIFY this Decision to the Parties;
- V. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- VI. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bajram Ljatifi

Gresa Caka-Nimani

**Kopje e vërtetuar
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