



REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 15 June 2023
Ref. no.:MK 2213/23

CONCURRING OPINION

of Judge

RADOMIR LABAN

in

case no. KO139/21

Applicant

Fadil Nura and 9 other deputies

Constitutional review of Decision No. 08-V-040 of the Assembly of the Republic of Kosovo of 21 July 2021 on the dismissal of the members of the Railway Regulatory Authority Board

Expressing from the beginning my respect and agreement with the opinion of the majority of judges that in this case, the challenged Decision of the Assembly no. 08-V-036 is not contrary to Article 65.9 [Competencies of the Assembly].

However, I, as a single judge, have a concurring opinion regarding the conclusion of majority and I do not agree with the opinion of majority. I agree with the opinion of the majority that the Decision no. 08-V-036 of the Assembly is not contrary to Article 65.9 [Competencies of the Assembly], but I also believe that the Court was obliged to respond to all Applicant's allegations and to state them in the enacting clause of the judgment because only the enacting clause of the judgment obliges all individuals and legal entities to respect them.

As a judge, I agree with the factual situation as stated and presented in the judgment and I accept the same factual situation as correct. I also agree with the way in which the Applicant's allegations were stated and presented in the judgment and I accept the same as correct.

However, I do not agree with the legal analysis regarding the admissibility of the case and the position of the majority regarding the Applicant's allegations of violation of Articles 4 [Form of Government and Separation of Power], Article 7 [Values], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 54 [Judicial Protection of Rights], as well as Article 142 [Independent Agencies] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Due to the above, and in accordance with Rules 62 and 63 of the Rules of Procedure of the Constitutional Court, to follow the reasoning of my concurring opinion as easily and clearly as possible, I will **(I)**, conduct the admissibility review regarding the allegations of violation of rights from Chapter II of the Constitution, namely, Articles 31, 32 and 54 of the Constitution; **(II)** conduct the constitutional review, regarding the allegations of violation of rights from Article 142 [Independent Agencies] of the Constitution; **(III)** Present the constitutional review regarding the allegations of violation of rights from Article 4 [Form of Government and Separation of Power], Article 7 [Values] of the Constitution; **(IV)** present a conclusion regarding the alleged violations of the Applicant's rights guaranteed by Article 4 [Form of Government and Separation of Power], Article 7 [Values], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 54 [Judicial Protection of Rights], as well as Article 142 [Independent Agencies] of the Constitution.

(I) Admissibility review regarding the allegations concerning the violation of rights from Chapter II of the Constitution, namely Articles 31, 32 and 54 of the Constitution

1. First of all, assessing the admissibility criteria and assessing the Applicants' allegations that the challenged decision violated the constitutional rights of the dismissed members of the RRA Board from Chapter II of the Constitution, I will assess the essence of the allegations made about each of the corresponding articles of the Constitution.
2. I recall that, among other things, the Applicants claim that the challenged decision of the Assembly violates the rights guaranteed by Chapter II of the Constitution for dismissed members of the RRA Board, for the following reasons:

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

3. In essence, the Applicants alleged that the challenged decision violated the right of the dismissed members of the RRA Board, guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution because, according to the Applicants, the Assembly did not give the opportunity to the dismissed members of the RRA Board to be heard regarding the reasons for their dismissal, and the challenged decision is not sufficiently reasoned.

Regarding the allegation of violation of Article 32 [Right to Legal Remedies], in conjunction with Article 54 [Judicial Protection of Rights] of the Constitution

4. In relation to this allegation, the Applicants emphasize that the challenged decision violated the right of the dismissed members of the RRA Board guaranteed by Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights], of the Constitution, emphasizing that *„Kosovo’s legal order does not provide an effective legal instrument for the dismissed members of the RRA Board to have their rights protected“*.
5. Regarding the above-mentioned allegations of the Applicants that the challenged decision violated the fundamental rights and freedoms from Chapter II of the Constitution, namely Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] as well as Article 54 [Judicial Protection of Rights], the Court recalls that the Applicants challenge the decision [No. 08-V-040] of the Assembly of 21 July 2021, which dismissed the members of the RRA Board.
6. I recall, regarding the criteria for constitutional review of “laws” adopted by the Assembly and “decisions” adopted by the Assembly, in the sense of Article 113.5, I emphasize that challenging the constitutionality of a law adopted by the Assembly is significantly different from challenging the constitutionality of a decision. This difference consists precisely in the fact that what determines the content of the act, namely what are the legal consequences produced by the act of the Assembly, namely whether the content of the act of the Assembly affects the general public interest or individual constitutional rights.
7. Therefore, what the Court had to assess in relation to the Applicants’ allegations regarding the violation of rights and freedoms from Chapter II of the Constitution, is the question of what legal consequences the challenged decision of the Assembly produced for the Applicants and whether they are affected by this decision, in order to further assess whether such allegations fall within the scope of application of Article 113.5 of the Constitution.
8. The meaning of raising violations in relation to the material aspects of the act of the Assembly must be viewed on a case-by-case basis, assessing the consequences of its content, whose interest is affected by the challenged act. The content of a legal norm may be in contradiction with constitutional norms, just as the content of an act of the Assembly may affect general public interests or individual rights.
9. I note that the members of the RRA Board were dismissed by the challenged decision of the Assembly, and in these circumstances, the Court finds that the last mentioned are directly individually affected by the challenged decision.
10. Therefore, from the above, in the circumstances of the present case, I assess that the dismissed members of the RRA were directly affected by the challenged decision.
11. It is noted that the Applicants’ allegations that the challenged act of the Assembly violate the constitutional rights of the members of the RRA Board, guaranteed by Articles 31, 32 and 54 of the Constitution, raise constitutional issues, but in the circumstances of the present case, not from paragraph 5 of Article 113 of the Constitution, because the challenged act qualifies as a legal act

that affects only individual rights, in the present case the individual rights of the members of the RRA Board, and not the general public interest.

12. In this context, the Applicants claim that the members of the RRA Board have their individual rights violated, because „ *Kosovo’s legal order does not provide an effective legal instrument for the dismissed members of the RRA Board to have their rights protected*”. In this regard, the Applicants emphasize that dismissed members of the RRA Board cannot initiate proceedings in the Basic Court, claiming that, according to the current law on administrative conflicts, the decision of the Assembly is not an administrative act, but an act of a constitutional body that is subject to constitutional review.
13. When examining the above-mentioned allegation, I assess that it should not be assumed a priori that the members of the RRA Board, as a special legal category, are exempted from the obligation to exhaust all effective legal remedies against the challenged act of the Assembly in regular proceedings, because, as previously explained, it directly affects their constitutional rights.
14. It is noted that the Applicants did not substantiate that there is a practice of regular courts similar to the circumstances of the present case, in which individuals were not able to challenge decisions of the Assembly that produce individual legal consequences.
15. Further and in connection with this, I note that in the enacting clause of the challenged decision it is not expressly established that an appeal against that decision is prohibited, nor the use of any legal remedy, and moreover, the challenged decision does not contain any legal remedy for the parties affected by it.
16. In addition, a review of the case files shows no information on whether the dismissed members of the RRA Board initiated proceedings before the competent authorities to challenge the decision of the Assembly by which they were dismissed from their positions in the RRA Board.
17. In this regard, based on the constitutional norms, in its case law, and referring to the principles defined by the ECtHR, I recall that our legislation does not expressly provide for the exclusion of this category of individuals exercising public functions from seeking judicial protection of their rights before regular courts. Moreover, their right to effective access to justice stems from the Constitution, even if such a thing is not expressly determined by law. (See analogously the ECtHR case [*Vilho Eskelinen and others v. Finland*](#), no. 63235/00, Judgment of 19 April 2007, paragraph 62, and the Court case KI214/21, with Applicant *Avni Kastrati*, Judgment of 7 December 2022, paragraph 125).
18. I also recall that Law No. 03/L-202 on Administrative Conflicts (hereinafter: LAC) provides effective legal remedies for solving cases of this category of public officials. In this regard, the Court initially emphasizes that the very purpose of the LAC as a law, as defined in Article 2 [Aim] is to ensure the judicial protection of the rights and interests of natural and legal persons and other parties, whose rights and interests are violated by: (i) individual acts; or (ii) actions of public

administration bodies. Further, Article 3, paragraph 1.1 of LAC stipulates that public administration bodies are central administration bodies, while paragraph 1.2 of the same defines as an administrative act any decision of the administrative body issued in an administrative procedure in the exercise of public authorizations and which directly or indirectly infringes the rights, freedoms or interests of legally recognized natural and legal persons. In addition to the provision defining the purpose of the law, more specifically Article 10 of LAC, inter alia, provides for the possibility of initiating an administrative conflict against acts for which a natural or legal person considers that a right or legal interest has been violated. (See KI214/21, cited above, paragraphs 115 and 116).

19. In this context, I also refer to the case law of the Constitutional Court of the Republic of Albania, namely Decision no. 29/09, of 21 October 2009, Applicant: *Group of 30 deputies of Albania*, by which, among other things, it was requested to annul the Decision of the Assembly [No. 190] of 16 June 2008, due to failure to give consent for the appointment of Mr. Z.P, for a member of the Supreme Court. In order to ascertain its jurisdiction, the court assessed whether the subject of constitutional review is an act of normative character and whether its intentions raise issues of conflict of jurisdiction between central or local authorities. Considering the circumstances of the case, the court in question found: *„The court has previously expressed that in trials of an abstract nature it is not competent to control acts of an individual nature. Given that the decision of the Assembly, which is subject to review, reflects the will of the Assembly not to give consent for the appointment of a member of the Supreme Court, the Court accepts that this act has an individual character. In these circumstances, the Court considers that it is not competent to control the decision of Assembly no. 190, of 16.06.2008. In conclusion, the Court concludes that the request initiated by a group of at least one-fifth of deputies (1/5) referred to the annulment of the decision of the Assembly no. 190 of 16.06.2008 should be quashed due to **the lack of legitimacy of the applicants** and the lack of jurisdiction of this court.*
20. Therefore, and on the basis of the above, I consider that the allegation of the Applicants, that the members of the RRA Board are not provided with effective remedies to exercise their civil rights, is ungrounded and is not objectively justified because no legal or constitutional provision forbids the members of the latter the right to seek legal protection of their rights in the regular proceedings, as it is established by Article 54 of the Constitution.
21. Therefore, the Court finds that the Applicants' referral in relation to the violations of the individual rights of the members of the RRA Board, guaranteed by Articles 31, 32 and 54 of the Constitution, does not meet the admissibility requirement for further consideration of the merits of the referral, because that the Applicants did not prove that the current legislation exempts this category of public officials from the obligation to seek legal protection before regular courts. Consequently, the requirement of exhaustion of effective legal remedies has not been met in relation to this part of the referral.
22. Therefore, based on the above, the Court finds that the Applicants are not an authorized party to challenge the constitutionality of the challenged act, in conjunction with the human rights guaranteed from Chapter II of the

Constitution, in accordance with Article 113.5 of the Constitution, as well as that the members of the RRA Board cannot be exempted from the constitutional obligation to exhaust all effective legal remedies provided by the applicable laws in the regular proceedings, as required by paragraph 7 of Article 113 of the Constitution.

(II) Constitutional review regarding the allegations concerning the violation of the rights under Article 142 [Independent Agencies] of the Constitution

23. Initially, I recall that da regarding the alleged violation of Article 142 [Independent Agencies] of the Constitution, the Applicants basically claim that:
- a) based on the Law on Railways, RRA is an independent body, and it therefore falls within the group of institutions provided for in Chapter XII of the Constitution and falls within the scope of Article 142 of the Constitution “*governing the independent agencies*”; and
 - b) by the challenged Decision, the Assembly failed to comply with the independence of RRA, as an independent agency and institution and arbitrarily, by dismissing all members of the RRA Board, as the main RRA body, blocking its work and operation. In this way, the Applicants allege that the organizational and functional independence of the RRA has been violated.
24. Initially, I emphasize that the Constitution has listed the independent institutions regulating their role and status under its Chapter XII. Likewise, the Constitution has provided under Article 142 the possibility for the Assembly to establish independent agencies by law.
25. In this regard, the Court refers to the independent institutions according to Chapter XII [Independent Institutions] of the Constitution, specifically Articles 132-135 [Role and Competencies of the Ombudsperson]; 136-138 [Auditor General of Kosovo]; 139 [Central Election Commission]; 140 [Central Bank of Kosovo]; and 141 [Independent Media Commission].
26. Whereas, I note that in Chapter XII, namely based on Article 142 of the Constitution, the Assembly has been authorized to establish independent agencies by relevant law, which will function based on such a law. Therefore, Article 142 of the Constitution stipulates that:

„Independent agencies of the Republic of Kosovo are institutions established by the Assembly based on the respective laws that regulate their establishment, operation and competencies. Independent agencies exercise their functions independently from any other body or authority in the Republic of Kosovo “.

27. I recall that the Constitution, in terms of status, distinguishes between the institutions established by the Constitution, namely those defined in Chapter

XII of the Constitution, and independent agencies established based on Article 142 of the Constitution. In relation to the former, the role and constitutional power are expressly regulated by constitutional provisions, while in relation to the latter, their role and powers are defined by law (see Court case, KO171/18, Applicant *Ombudsperson Institution*, Judgment of 25 April 2019, paragraph 157).

28. In light of the elaboration above, it results that Article 142 of the Constitution does not authorize the Assembly of Kosovo to establish other independent constitutional institutions with the same status as the independent institutions or agencies defined in Chapter XII of the Constitution. Furthermore, the Court recalls that both the Applicants and the relevant Assembly Committee have not provided relevant and concrete clarifications as to whether or not RRA falls within the scope of Article 142 of the Constitution. Consequently, in assessing this specific allegation, the Court will be limited to the oversight role of the Assembly defined by paragraph 9 of Article 65 of the Constitution, which stipulates that it “*oversees the work of the Government and other public institutions that report to the Assembly in accordance with the Constitution and the law*”.
29. Regarding the Applicants' allegation that the Assembly did not respect the RRA's independence as an independent agency and institution and arbitrarily, through the dismissal of all members of the Board as the main RRA body, blocked its work and operation, the Court recalls that the Assembly Committee, following the evaluation of the Work Report of the RRA Board, issued a recommendation containing the findings on the problems of the railway system and issues of institutional responsibility of RRA, with the proposal to dismiss the members of the RRA Board.
30. I further assess that as it has established above, the Assembly, based on paragraph 9 of Article 65 of the Constitution, has exercised its competence to oversee public institutions, which, based on the Constitution or laws, report to the Assembly.
31. In light of the foregoing, I note that the Assembly, when dismissing the members of the RRA Board, acted in line with its oversight role, as established in paragraph 9 of Article 65 of the Constitution and Article 38 of the Law for Railways, and the Applicants' allegation of violation of Article 142 [Independent Agencies] of the Constitution is therefore unfounded on constitutional basis.

(III) Constitutional review regarding the allegations of violation of rights under Article 4 [Form of Government and Separation of Power] and Article 7 [Values] of the Constitution

32. I note that the essence of the Applicants' allegations regarding the challenged act of the Assembly refers to the way in which the Assembly exercised its supervisory authority established in paragraph 9 of Article 65 of the Constitution in relation to the RRA, which resulted in the adoption of the challenged decision, by which the Assembly decided on dismissal of members of the RRA Board.

33. Regarding these allegations, I recall of the relevant parts of the general principles regarding the principle of separation of powers established by the case law of the Court, as in the case KO219/19, in which it was emphasized that the principle of legal certainty and predictability are essential characteristics of the law and an integral part of the constitutional principle of the rule of law. Legal certainty is one of the main pillars of the rule of law and requires, among other things, that rules be clear and precise and strive to ensure that legal situations and relationships remain predictable. Predictability first requires that the legal norm be formulated with sufficient accuracy and clarity, in order to enable individuals and legal entities to regulate their conduct in accordance with it. Individuals and other legal entities must know exactly how and to what extent they are affected by a certain legal norm and how a new legal norm changes their previous status or situation provided for by another legal norm. Public authorities, when drafting laws, must also take into account these basic principles of the rule of law, as an important part of the constitutional system of the Republic of Kosovo.
34. The Court, as it has emphasized in its case law, recalls that Article 4 of the Constitution regulates the form of government and the separation of powers, defining under paragraph 2 of Article 4 that the Assembly is a representative body of the people and also the highest state body exercising legislative power; the President of the Republic of Kosovo, according to paragraph 3 of Article 4 of the Constitution represents the unity of the people and is the legitimate representative of the country, internally and externally, and is the guarantor of the democratic functioning of the institutions; whereas, the Government of the Republic of Kosovo, according to paragraph 4 of Article 4 of the Constitution, is responsible for the implementation of laws and state policies and the same is subject to parliamentary control by the Assembly. Therefore, the principle of the separation of powers is a fundamental democratic value based on which the constitutional order of the Republic of Kosovo is built and functions (see case KO43/19).
35. Based on the elaboration above as well as referring to the Applicants' allegations, the Court notes that in the present case, we are not dealing with circumstances that would involve matters related to the scope of Articles 4 and 7 of the Constitution, and that for this reason, I consider that the Applicant's allegations of violation of the rights guaranteed by Article 4 [Form of Government and Separation of Power] and Article 7 [Values] of the Constitution are unfounded on constitutional basis.

(IV) Conclusion regarding alleged violations of the Applicants' rights

36. Based on the above, and taking into account the considerations of the Applicants' allegations in their referral:

- I. I CONSIDER THAT the Court should have DECLARED the referral inadmissible for consideration of merits of the allegations of violation of the constitutional rights of the members of the Railway Regulatory Authority Board, guaranteed by Articles: 31 [Right to Fair and Impartial Trial] and 32 [Right to Legal Remedies] in conjunction with Article 54 [Judicial Protection of Rights] of the Constitution;
- II. I CONSIDER THAT the Court should have DECLARED the referral admissible for consideration of merits of the allegations of articles: 4 [Form of Government and Separation of Power], 7 [Values] and 65.9 [Competencies of the Assembly], as well as of Article 142 [Independent Agencies] of the Constitution;
- III. I CONSIDER THAT the Court should have HELD that the Decision of the Assembly no. 08-V-036 is not contrary to Article 4 [Form of Government and Separation of Power], Article 7 [Values], Article 65.9 [Competencies of the Assembly], as well as Article 142 [Independent Agencies] of the Constitution;

Concurring Opinion is submitted by Judge;

Radomir Laban, Judge

on 12 April 2023 in Prishtina