



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

Prishtina, on 23 December 2024
Ref.no.: MK 2599/24

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CONCURRING OPINION

of Judge

RADOMIR LABAN

in

case no. KO283/23

Applicant

Abelard Tahiri and 9 other deputies

Constitutional review of Decision no. 08-V-668 of 15 December 2023, of the Assembly of the Republic of Kosovo, on dismissal of Mr. Agron Beka from the position of KPC member

Expressing from the beginning my agreement with the opinion of the majority of judges to hold that the case is admissible for review in conjunction with article 65 [Competencies of the Assembly] and article 110 [Kosovo Prosecutorial Council] of the Constitution.

Further, 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.

I also agree with the conclusion of majority TO HOLD, that decision [no. 08-V-583 and 13] of the Assembly of 15 December 2023, is not contrary to paragraph 9 of Article 65 [Competencies of the Assembly] and paragraph 4 of Article 110 [Kosovo Prosecutorial Council] of the Constitution, as well as the decision of the majority on interim measure.

However, I, as an individual judge, have a concurring opinion regarding the reason of inadmissibility of this case regarding article 31 [Right to Fair and Impartial Trial], article 32 [Right to Legal Remedies], and article 54 [Judicial Protection of Rights].

Due to the above, and in accordance with Rule 57 of the Rules of Procedure of the Constitutional Court, I will briefly state my concurring opinion.

1. I recall of the essence of the applicants' allegations related to Article 31 [Right to Fair and Impartial Trial] of the Constitution, in which the applicants emphasize that the decision of the Assembly was not reasoned and that the Assembly failed to comply with the constitutional standards guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, which includes the right to equal protection and a fair trial. The applicants argue that Mr. Beka did not have the opportunity to become familiar with the file and to present evidence in accordance with the Law on General Administrative Procedure, and that as a result, Mr. Beka sent a letter to the Assembly providing clarifications, namely counter arguments to the initiator of his dismissal, in the present case to the Chairperson of the Committee on Legislation.
2. In this regard, I note that he, when it comes to this allegation about the lack of reasoning of the contested decision, which is guaranteed by Article 31 of the Constitution.
3. As for the claims of the applicants that refer to Articles 32 and 54 of the Constitution, I recall that the applicants emphasized that *"the circumstances of legal uncertainty in relation to the dismissed non-prosecutor member are evident where in the basic law, paragraph 10 of article 10 clearly contradicts article 19 of this law, placing him in a situation of effective impossibility to exercise the constitutional right to use legal remedies, contrary to article 32 of the Constitution [...] as well as the provision of judicial protection from Article 54 of the Constitution"*.
4. In reviewing these allegation, I recall that based on the constitutional norms and the case law and referring to the principles defined by the ECtHR, 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).
5. I recall that Law No. 03/L-202 on Administrative Conflicts (hereinafter: LAC) provides effective legal remedies for resolving cases of this category of public officials. In this regard, I initially emphasize 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).

6. 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.*
7. Therefore, and on the basis of the above, I consider that the allegation of the Applicants, that the members of the Kosovo Prosecutorial Council 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 Kosovo Prosecutorial Council the right to seek legal protection of their rights in the regular proceedings, as it is established by Article 54 of the Constitution.
8. Therefore, I find that the Applicants' referral in relation to the violations of the individual rights of the members of the Kosovo Prosecutorial Council, 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 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.
9. Therefore, based on the above, I find that the Applicants are not an authorized party to challenge the constitutionality of the contested 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 Kosovo Prosecutorial Council 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.

Concurring Opinion is submitted by Judge;

Radomir Laban, Judge

On 26 November 2024 in Prishtina

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