



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

Prishtina, on 19 December 2016
Ref. No.:RK1018/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI108/16

Applicants

Bojana Ivković, Marija Perić and Miro Jaredić

**Request for constitutional review of the Decision No. 2016-COS-0488,
issued by the Acting Head of the European Union Rule of Law Mission in
Kosovo, dated 22 July 2016**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicants

1. The Referral was submitted by Bojana Ivković, Marija Perić and Miro Jaredić (hereinafter: the Applicants). They are represented by Axelle Reiter, lawyer from Brussels, Belgium.

Challenged decision

2. The Applicants challenge a Decision (No. 2016-COS-0488, of 25 July 2016) issued by the Acting Head of the European Union Rule of Law Mission in Kosovo (hereinafter: EULEX). Through the challenged decision the Applicants were informed that their employment contracts with EULEX will not be renewed beyond 14 November 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision which has allegedly violated the Applicants' rights guaranteed by Article 3 [Equality Before the Law] paragraph 2; Article 22 [Direct Applicability of International Agreements and Instruments]; Article 24 [Equality Before the Law]; Article 58 [Responsibilities of the State]; Article 53 [Interpretation of Human Rights Provisions]; and Article 61 [Representation in Public Institutions Employment] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution). The Applicants also allege that there has been a violation of their rights as guaranteed by Article 6 (Right to Fair Trial) paragraph 1 and Article 13 (Right to an Effective Remedy) of the European Convention on Human Rights (hereinafter: the ECHR) as well as the rights guaranteed by Article 4, Article 5 and Article 6, paragraph 2 of the Framework Convention on the Protection of National Minorities (hereinafter: the FCPNM).
4. The Applicants also request from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose interim measures, namely to suspend "[...] *the EULEX selection process for all language assistants or, in the case of Bojana Ivković* [Court's note: one of the Applicants], *other posts that she should have been permitted to compete for regardless of her inability to read write or speak in Albanian pending judgment of the Court on the substance of this case.* [...]"
5. The Applicants further request from the Court "[...] *to recuse and/or excuse all EULEX judges and international legal advisers engaged within Kosovo from taking part in any official consideration of this petition* [Referral] [...]"

Legal basis

6. The Referral is based on Article 113.1 and 113.7 of the Constitution, Articles 18, 27 and 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rules 54, 55 and 56 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 22 August 2016, the Applicants submitted the Referral to the Court.
8. On 30 August 2016, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur. On the same date, the President appointed the

Review Panel composed of judges: Ivan Čukalović (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

9. On 7 September 2016, the Court notified the Applicants of the registration of the Referral. On the same date, the Court sent a copy of the Referral to EULEX and offered it the opportunity to comment on the Referral.
10. On 8 September 2016, the Applicants submitted an additional document to the Court, as a supplement to their initial Referral.
11. On 19 September 2016, the Head of EULEX submitted a letter to the Court stating that: “[...] *EULEX does not wish to comment on the Referral at this stage.*”
12. On 16 November 2016, the Review Panel considered the report of the Judge Rapporteur and made a unanimous recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

13. The Applicants are employees of EULEX. Bojana Ivković was employed as Administrative/Language Assistant (Serbian/English) since 1 September 2008. Marija Perić was employed as Language Assistant (Serbian/English) since 19 March 2009. Miro Jaredić was employed as Language Assistant (Serbian/English) since 21 January 2010. Their current employment contracts are fixed-term contracts effective until 14 November 2016.
14. The discussions between the respective European Union and Republic of Kosovo political authorities to extend the mandate of EULEX beyond the then existing timeline, had begun in 2015. In preparing for a continued mandate, EULEX had informed all its employees, including the Applicants, that “*should the mandate be extended, there would be reorganization of the Mission which could lead to staff reduction.*”
15. On 14 June 2016, the Council of the European Union adopted the Council Decision (CFSP) 2016/947, which amended the Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo.
16. Following the Council Decision, on 17 June 2016, the Assembly of the Republic of Kosovo adopted the Law No.05/L-102 on the Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo (hereinafter: the Law on Ratification of the International Agreement), and subsequently, the Law No.05/L-103 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (hereinafter: the Law on EULEX Mandate). The Laws were promulgated by the Decree of the President of the Republic of Kosovo and published on the Official Gazette of the Republic of Kosovo on 29 June 2016, resulting on the extension of the mandate of EULEX until 14 June 2018.

17. On 24 June 2016, the Acting Head of EULEX issued three identical notification letters to the Applicants whereby they were informed that a restructuring of the EULEX Mission has taken place. Hence, the Applicants were individually informed that:

"[...] the position you have been occupying during your employment with EULEX is no longer foreseen in the new Mandate period.

Accordingly, this notification letter is to inform you that your employment contract will not be renewed beyond on 14 November 2016."

18. On 29 June 2016, the Applicants filed an internal appeal contesting the content of the abovementioned notifications.

19. On 22 July 2016, the Acting Head of EULEX (Decision No. 2016-COS-0488) rejected the internal appeal filed by the Applicants. The challenged Decision was reasoned as follows:

"Your timely filed appeal requesting the annulment of the decisions arising from the current reconfiguration process affecting the renewal of your employment contract beyond 14 November 2016 is hereby rejected. Your alternative claim seeking compensation for damages is also rejected.

In your complaint you asserted that certain effects of the current reconfiguration are resulting in direct or indirect ethnical discrimination.

[...]

[...] It was explained in several occasions both by the Mission management as well as by the Civilian Operations Commander that these organisational changes are inevitable to adapt the Mission to the changing political and legal environment. Further to that Member States agreed on a five months transition to implement these changes in order to ensure a fair and equal selection process where required as well as to provide adequate notice period for those who cannot continue with their respective employments. You will also recall that the employment contracts are and always were issued for a short fixed term period defined by the mandate and/or the budget. Therefore none of the employment contracts were terminated; some will not be renewed beyond their respective expiration date. The Mission is under no circumstances obliged to offer a contract beyond its expiration, however we are obliged to justify the eventual non-renewal with valid and objective reasons, which in this case is the reconfiguration itself. [...]"

20. On 27 July 2016, the Applicants submitted a request to resolve the dispute through arbitration, referring to the provisions of their respective contracts.
21. The Applicants' request for arbitration was rejected by EULEX on two occasions, 4 August 2016 and 8 August 2016 respectively, with the following reasoning:

“EULEX maintains [...] that your fixed term employment contract was not terminated; it was not-renewed beyond its normal expiration, 14 November 2016. [...] EULEX understands that your request falls outside the applicability of article 29 of the General Service Conditions which foresees arbitration as a dispute resolution mechanism regarding the interpretation or performance of the contract.”

Applicant’s allegations

22. The Applicants allege that EULEX, by issuing the challenged Decision, has violated their rights guaranteed by Articles 3 [Equality Before the Law] paragraph 2, Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law], Article 53 [Interpretation of Human Rights Provisions], Article 58 [Responsibilities of the State] and 61 [Representation in Public Institutions Employment] of the Constitution in conjunction with their rights guaranteed by Articles 6.1 (Right to Fair Trial) and 13 (Right to an Effective Remedy) of the ECHR as well as their rights guaranteed by Articles 4, 5 and 6.2 of the FCPNM.
23. The Applicants maintain that the reduced number of positions within EULEX as a result of its reorganization, for which the affected employees, including the Applicants, have to recompetete, introduced new criteria, which the Applicants allege discriminates them from competing for work, for which they would have otherwise been qualified for. The Applicants particularly contest the introduction of the so-called *“trilinguality requirement”* i.e., the requirement of proficiency in English, Albanian and Serbian for the Administrative/Language Assistants posts.
24. The Applicants claim that they have been discriminated against, considering that *“none of the petitioners [Court’s note: the Applicants] can satisfy this requirement”*. They also claim that *“requiring a competence in Albanian has the effect of discriminating against us because it prevents us from taking part in the competition for the new post created within the Mission and thus excludes us from continuing our employment.”*
25. According to the Applicants, the absence of newly published vacancies for bilingual Serbian-English Language Assistant posts, prevents two of them from applying for the positions they currently hold, and the three of them from taking part in any internal or external competition with EULEX. The Applicants further argue that taking into account that the reconfiguration of EULEX continues to provide some posts for bilingual Albanian-English Language Assistant, they have been disadvantaged and discriminated against their Albanian speaking colleagues.
26. With respect to the rejection of the Applicants’ request for dispute resolution through arbitration, they refer to the fact that “Article 6 of the ECHR entitles everyone to a fair and a public hearing within a reasonable time by an independent and impartial tribunal established by law” and allege that EULEX has denied them this right, in violation of the ECHR.

27. The Applicants also claim that although “an international actor”, EULEX “is engaged in public service provision in Kosovo”, and therefore “[...] is bound to respect the international norms that prohibit discriminatory activity because its duties and obligations are, *mutatis mutandis*, those of a public authority in Kosovo.” They further claim that EULEX “is bound by and to the same obligations and rules as a public authority as it is one of the manifestations of such public authority in Kosovo.”
28. Finally, the Applicants address the Court with the following request:

“We petition to the Court to pronounce that EULEX Kosovo has acted in breach of our fundamental rights and freedoms guaranteed under Articles 3.2, 22, 24, 53, 58, and 61 of the Constitution, the ECHR and its Protocols, and the Council of Europe FCPNM.

Therefore, we petition the Court to annul the litigious decisions and order to firstly that EULEX should to engage in contractual dispute resolution procedure and, secondly, in the meantime, to permit the petitioners’ continuation and/or instatement in their functions until the conclusion of the dispute resolution procedure, and finally, to abide to the outcome of the said procedure, and, in any event to award us adequate compensation in the form of appropriate damages for the loss, damage and distress occasioned to us thus far and interests.

If EULEX should decline to engage in the contractual dispute resolution procedure, we petition the Court to order EULEX’s immunity from suit in the courts of Kosovo should be lifted in favour of the petitioners for the limited purposes of entitling the petitioners to make their claim against EULEX [...].”

Request for recusal

29. The Applicants also requested the Court to “*recuse and/or excuse all EULEX judges and international legal advisors engaged within Kosovo from taking part in any official consideration of this petition under Rule 7 of its Rules of Procedure on account of certain circumstances which objectively give rise to reasonable suspicions as to their independence and impartiality.*”
30. The Applicants maintain that taking into account that the „international judges“ in the Court are paid through contracts with EULEX, they „*may be subject to such unconscious self-censorship or self-regard that their engagement in considering advising and determining this petition amounts to a denial of the petitioners’ [Court’s note: Applicants’] constitutionally guaranteed right to a hearing before an independent and impartial tribunal.*“
31. The Applicants claim that in such circumstances, the conditions for exclusion of a judge as provided for by Article 18 of the Law have been met as, according to them, the international judges in the Court are „*involved in the case that is subject of consideration by the Constitutional Court.*“

32. The Court first notes that the Law enumerates the bases upon which a judge is “excluded” from participation in court proceedings. One of the bases includes a situation in which a judge is “involved” in the case that is subject to consideration by the Court. The Law however provides for the definition of “involvement” and, in paragraph 2 of Article 18, it specifically provides that *“Judge is not included in the case, as per paragraph 1, item 1.1., only because he belongs to a certain social or gender group, a profession or political entity, the interest of which may be affected by the outcome of the process in the Constitutional Court”*.
33. Secondly, the Court notes that the Applicants have based their request for recusal on general, abstract and identical grounds, without making any reference to specific, material facts that could have substantiated any objectively justified doubts as to the impartiality of the judges in this specific case. (See, *mutatis mutandis*, European Court of Human Rights (hereinafter: ECtHR), Judgment of 9 July 2015, *A.K. v. Liechtenstein*, application no. 38191/12).
34. Thirdly, the Court notes that the Applicants' request the recusal on identical grounds of two (2) out of the eight (8) judges in the current composition of the Court. The Court recalls that based on the Law and its Rules of Procedure, it takes decisions based on majority vote, provided that the quorum of seven (7) judges as determined by the Law is maintained. The Court also recalls that under Rule 7 (4) of the Rules of Procedure, judges who are subject to a request for recusal may not participate in a decision on their recusal. Accordingly, the request for recusal affects a greater number of judges than the one required to take a decision.
35. Finally, the Court notes that *“the possibility of excluding judges must not result in the inability of the Court to take a decision. It must be ensured that the Constitutional Court as guarantor of the Constitution remains functioning as a democratic institution”*. (See Venice Commission, Opinion no.370/2006, *Opinion on the Two Draft Laws Amending Law No.47/1992 on the Organization and Functioning of the Constitutional Court of Romania*, 20 March 2006, p.7; Venice Commission, *Opinion no. 833/2015 on Amendments to the Act of 25 June 2015 of the Constitutional Tribunal of Poland*, 11 March 2016, p. 37; see also, *mutatis mutandis*, ECtHR Judgment of 9 July 2015, *A.K. v. Liechtenstein*, application no. 38191/12).
36. Accordingly and based on the rationale provided above, the Applicants' request for recusal will not be taken into consideration.

Admissibility of the Referral

37. The Court first examines whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.
38. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parites] of the Constitution, which establishes:

“(1) The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.”

[...]

(7) Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”

39. The Court notes that the Applicants contest the constitutionality of Decision (No. 2016-COS-0488, of 25 July 2016) issued by the Acting Head of EULEX.
40. The Court recalls that in accordance with Article 113.7 of the Constitution, individuals are solely authorized to “*refer violations of their individual rights and freedoms*” where these alleged violations were committed by “*public authorities*”. In other words, individuals may seek protection from the Court only in cases when they consider that their rights and freedoms guaranteed by the Constitution were violated by a “*public authority*”.
41. Accordingly, the Court emphasizes that for the purposes of determining the admissibility of a Referral, it is mandatory for the Court to conclude that the allegations of a violation raised by the Applicants can be attributed to a public authority of the Republic of Kosovo.
42. In this respect, the Court recalls that the Assembly of the Republic of Kosovo adopted the Law on the EULEX Mandate (No.05/L-103) based on the Law on Ratification of the International Agreement (No.05/L-102). According to the ratified International Agreement, the Republic of Kosovo, based on Article 20 [Delegation of Sovereignty] of the Constitution, has delegated certain competencies of its public authorities to the European Union to be implemented through EULEX. The same International Agreement also guarantees the immunities of the Offices and personnel of EULEX and of the EU Special Representative (EUSR), pursuant to Law No. 03/L-033 on the Status, Immunities, and Privileges of the Diplomatic and Consular Missions and Personnel in Kosovo and of the International Military Presence and its Personnel.
43. As such, in accordance with the Council Joint Action (2008/124/CFSP, of 4 February 2008), referred to in the Law on Ratification of the International Agreement, EULEX is a separate authority from those of the Institutions of the Republic of Kosovo as defined in the Constitution. According to the abovementioned Council Joint Action, EULEX’s mission is to “[...] *assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service [...]*”. In fulfilling such mission, EULEX is called upon to “*monitor, mentor and advise the competent Kosovo institutions [...]* whilst retain certain executive responsibilities”.
44. In this respect, the Court finds that Applicant’s claims that EULEX is to be considered as a public authority in Kosovo do not stand. The Court considers

that there is no legal basis which may lead to the conclusion that EULEX was established to serve as a public authority within the Republic of Kosovo and that it should be regarded as such by the Constitutional Court or by any other institution in the Republic of Kosovo.

45. Accordingly, the Court finds that the Applicant's referral does not meet the requirements set forth in Article 113.7 of the Constitution, namely that, "*Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, [...]*".
46. Taking into account that the Applicants challenge a Decision that is not an act of a public authority of the Republic of Kosovo, based on Rule 36 [Admissibility Criteria] (3) (f) of the Rules of Procedure, the Court deems the Referral inadmissible as incompatible *ratione personae* with the Constitution.
47. Rule 36 of the [Admissibility Criteria] of the Rules of Procedure establishes:

"(3) A referral may also be deemed inadmissible in any of the following cases:

[...]

(f) The Referral is incompatible ratione personae with the Constitution."

48. Finally, considering that the present Referral is declared inadmissible as incompatible *ratione personae* with the Constitution, the Court cannot consider the merits of the Referral.
49. The Court concludes that since the Applicants have not fulfilled the requirements provided by Article 113.1 and 113.7 of the Constitution, and consequently the ones outlined in Article 47 [Individual Requests] and Article 48 [Accuracy of the Referral] of the Law, based on Rule 36 [Admissibility Criteria] (3) (f) of the Rules of Procedure, the Referral is to be rejected as inadmissible.

Request for interim measure

50. The Applicants request from the Court to impose interim measures, namely to suspend "[...] the EULEX selection process [...] pending judgment of the Court on the substance of this case. [...]"
51. In making thier case, the Applicants argue that they would suffer irreparable damage because „*If EULEX continues the selection process uninterrupted during the proceedings in front of the Court, it will appoint, conclude all competitions and allocate all available national posts leaving no possibility for our [Court's note: the Applicants] continued engagement in the Mission...*“.
52. In order for the Court to impose an interim measure, in accordance with paragraph 4 of Rule 55 of the Rules of Procedure, it is necessary 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;...

If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application.”

53. As mentioned above, the Applicants have not shown a *prima facie* case on the admissibility of the Referral. Therefore, the request for imposition of an interim measure is to be rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court of Kosovo in accordance with Article 113.1 and 113.7 of the Constitution, Articles 18, 27 and 47 of the Law and Rules 36, 54, 55 and 56 of the Rules of Procedure, in the session held 16 November 2016, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the request for interim measures;
- III. TO NOTIFY the Parties of this Decision;
- IV. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law; and
- V. TO DECLARE this Decision effective immediately;

Judge Rapporteur

Gresa Caka-Nimani
Gresa Caka-Nimani



President of the Constitutional Court

Arta Rama-Hajrizi
Arta Rama-Hajrizi