



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

Prishtina, 13 November 2014
Ref. No.: RK732/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KO155/14

Applicant

Ombudsperson of the Republic of Kosovo

**Constitutional Review of Decree no. DKGJK-001-2014
of the President of the Republic of Kosovo, on Confirmation of the
Continuation of Mandate of the International Judges of the
Constitutional Court of the Republic of Kosovo, dated 31 August 2014**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is the Ombudsperson of the Republic of Kosovo, Mr. Sami Kurteshi.

Challenged Decree

2. The Applicant challenges Decree no. DKGJK-001-2014 of the President of the Republic of Kosovo, on Confirmation of the Continuation of the International Judges of the Constitutional Court of the Republic of Kosovo, dated 31 August 2014 (hereinafter: the “Decree”).

Subject matter

3. The Applicant requests the review of the constitutionality of the Decree alleging that it is in contradiction with the constitutional procedure for the election of the Judges of the Constitutional Court as laid down in Articles 114.2 [Composition and Mandate of the Constitutional Court], 65 (11) [Competences of the Assembly] and 84 (19) [Competencies of the President] of the Constitution of the Republic of Kosovo (hereinafter: the “Constitution”).
4. Furthermore, the Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter: the “Court”) “[...] *to impose interim measures for immediate suspension of the Decree of the President until the final decision of the Court.*” In addition, the Applicant request the Court to find that “[...] *it is in the public interest and of democracy that three international judges do not continue to participate in the decision making of this Court, until the constitutionality of their appointment is provided.*”

Legal basis

5. Articles 113.2 (1) and 135.4 of the Constitution, Articles 27, 29 and 30 of 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

6. On 9 October 2014 the Applicant submitted the Referral to the Court.
7. On 10 October 2014 the President of the Constitutional Court, by Decision No. GJR. KO155/14, appointed Judge Arta Rama-Hajrizi as Judge Rapporteur. On the same date, the President of the Constitutional Court, by Decision No. KSH. KO155/14, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Ivan Čukalović and Enver Hasani.
8. On 13 October 2014 the Court notified the Applicant of the registration of the Referral and requested him to submit additional documents.
9. On the same date the Court sent a copy of the Referral to the President of the Republic of Kosovo and asked her to submit her comments together with any documents that she deems necessary with respect to the Referral. The President of the Republic of Kosovo has not submitted any comments.
10. On 14 October 2014 the Applicant submitted additional documents.

11. On 4 November 2014 the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court on the inadmissibility of the Referral.
12. On 19 August 2014 the Court decided (Case KI124/14) to exclude Judge Kadri Kryeziu from participating in the deliberations in all future referrals to the Constitutional Court involving, among others, the Ombudsperson. Therefore, Judge Kadri Kryeziu did not participate in the Court's proceedings and ruling on the current Case KO155/14.

Summary of facts

13. On 12 June 2009 the International Civilian Representative (hereinafter: the "ICR") appointed three international judges to the Court for a term of three year (Decisions No. 2009/09, 2009/10 and 2009/11).
14. On 17 July 2012 the ICR issued Decisions Nos. 2012/17, 2012/18 and 2012/19 on reappointing the International Judges until 31 August 2014.
15. On 14 April 2014 the President of the Republic of Kosovo sent a letter to the High Representative of the [European] Union for Foreign Affairs and Security Policy (hereinafter: the "European Union"), *inter alia*, to confirm "*the appointment of [...] the international judges serving in the Constitutional Court and appointed by the ICR [...]*".
16. On the same date, the High Representative of the European Union replied to the President of the Republic of Kosovo accepting the letter of 14 April 2014.
17. On 23 April 2014 the Assembly of the Republic of Kosovo approved, by a 2/3 majority, Law No. 04/L-274 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 (hereafter: "Law No. 04/L-274").
18. On 31 August 2014 the President of the Republic of Kosovo issued "*Decree on Confirmation of the Continuation of Mandate of the International Judges of the Constitutional Court of the Republic of Kosovo*," based on Article 84.4 of the Constitution, Article 2 (Annex 1) of Law No. 04/L-274 and the contents of Letter No. 693 of 25 August 2014 from the EULEX Kosovo Head of Mission to the President of the Republic of Kosovo.

Arguments presented by the Applicant

19. The Applicant claims that the challenged Decree has not been adopted in accordance with the applicable constitutional provisions.
20. In this respect, the Applicant alleges that the Decree of the President is contrary to the constitutional procedure for the election of the Judges of the Constitutional Court, since the President of the Republic of Kosovo continued the mandate of the three international judges without the proposal of the Assembly of the Republic of Kosovo (hereinafter: the "Assembly").

21. The Applicant explains that *“The Judges of that Court [Constitutional Court] are appointed by the President “upon the proposal of the Assembly,” Article 114.2 of the Constitution. This specific role of the Assembly is confirmed also by other constitutional provisions. Article 65.11 determines that “The Assembly of the Republic of Kosovo [...] proposes the Judges for the Constitutional Court” and in the same manner Article 84.19 determines that “The President of the Republic of Kosovo appoints judges to the Constitutional Court upon proposal of the Assembly”.*
22. The Applicant considers that, *“The involvement of the Assembly in the election procedure for judges of the Constitutional Court ensures that no one can take a position in the highest Court without being proposed by the direct representatives of the people.”*
23. The Applicant further alleges that the *“Continuation of the mandate of the three international judges without the proposal of the Assembly is not justified by the content of the international agreement of 2014 between the Republic of Kosovo and the European Union.”*
24. In this respect, the Applicant states that the *“The main question in this case is whether this international agreement together with the appointment of the three international judges by EULEX can justify the circumvention of the Assembly for the continuation of the three international judges in contradiction with the foreseen constitutional procedures.”*
25. The Applicant refers to the letter of the President of the Republic of Kosovo of 14 April 2014, reading, inter alia, as follows: *“Article 20 of the Constitution of the Republic of Kosovo permits the Republic to delegate certain powers for specific matters to international organizations. [...] Therefore, I confirm that the following powers would be delegated to EULEX Kosovo under Article 20 of the Constitution of the Republic of Kosovo: (a) to appoint judges under Article 65, 108, 114 and 84 of the Constitution respectively, subject to Presidential confirmation of appointment following endorsement by the Kosovo Judicial Council [...].”*
26. The Applicant argues that *“Although it does not specify that competences for appointing judges will be delegated to EULEX, in particular concerning the Constitutional Court judges, this paragraph [the abovementioned reference to the letter] refers to Article 114 [of the Constitution] that has the title “Composition and Mandate of the Constitutional Court”, which determines that “[j]udges shall be appointed by the President of the Republic of Kosovo upon the proposal of the Assembly” (Article 114.2).”*
27. The Applicant further considers that, *“According to Article 20, in order for the competence to be delegated to an international organization, that delegation must be based on an international agreement.” [...] “In the case of the agreement between the Republic of Kosovo and the European Union the letter of the first party, the Republic of Kosovo, represented by President Jahjaga, invited the European Union, represented by Baroness Ashton, to continue the stay of EULEX until 2016. As part of this invitation, President Jahjaga*

proposed that EULEX takes over certain competences, including the competences of the appointment of the judges of the Constitutional Court. According to the usual procedure [...] the reply of Baroness Ashton should be a letter that gives a reply to the first party by “reproducing the full content of the original letter and expressing their approval upon that.”

28. According to the Applicant, this did not happen, but the reply was simple reading as follows: *“I accept the invitation contained in your letter dated 14 April to continue to implement the mandate of EULEX KOSOVO, as laid down in Joint Action 2008/124/CFSP, adopted by the Council of the European Union on 4 February 2008 as amended and in the spirit of mutual cooperation.”*
29. In this respect, the Applicant alleges that the *“Joint Action authorizes EULEX to act only within the institutions created based on Resolution 1244. [...] Since the Constitutional Court has not been an institution created according to Resolution 1244, it is clear that the competences to appoint the judges of the Constitutional Court would make EULEX fall outside the framework of the Joint Action. Therefore, the delegation of the competence of the appointment to EULEX has not been officially accepted by Baroness Ashton and is not part of the international agreement.”*
30. The Applicant further alleges that the President of the Republic of Kosovo, in her letter of 14 April 2014, has not delegated in a clear and specific manner the competence to propose the judges to EULEX in accordance with Article 31(1) of the Vienna Convention on International Treaties. Therefore, allegedly, the competence to propose the judges remains with the Assembly of the Republic of Kosovo.
31. The Applicant concludes that the Court has jurisdiction *ratione materiae* to review this case, because the Referral challenges the constitutionality of the Decree and not of the international agreement between the Republic of Kosovo and the European Union. He argues that *“[...] the substance of the decree is not an international agreement but is only a confirmation of the mandate of the three international judges.”* Additionally, *“A legal act cannot slip from the jurisdiction of the Constitutional Court, just by citing an international agreement. If it would be so simple, then the President can cite international agreements as a legal basis of all her decrees or acts, notwithstanding whether there is a connection or not. In this way she will be protected from review of their constitutionality by the Court in respect to all her actions.”*

Admissibility of the Referral

32. As to the Applicant’s allegation that Decree No. DKGJK-001-2014 issued by the President of Kosovo on 31 August 2014 is unconstitutional, the Court observes that, in order to be able to adjudicate the Applicant's complaint, it is necessary to first examine whether the Applicant has fulfilled the admissibility requirements as laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

33. The Court first needs to determine whether the Applicant can be considered as an authorized party. In that respect, Article 113.2 of the Constitution establishes that:

“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; [...]”

Furthermore, Article 135.4 of the Constitution stipulates that:

“The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution.”

34. In the present Referral, the Ombudsperson challenges Decree No. DKGJK-001-2014, issued by the President of the Republic of Kosovo on 31 August 2014. Therefore, the Applicant is an authorized party, entitled to refer this case to the Court, by virtue of Articles 113.2 and 135.4 of the Constitution.
35. As to the further requirement of Article 30 of the Law that the Applicant must have submitted the Referral “within a period of six (6) months from the day upon which the contested act enters into force”, the Court determines that Decree No. DKGJK-001-2014 was issued on 31 August 2014, whereas the Applicant submitted the Referral to the Court on 9 October 2014. The Applicant, therefore, has met the deadline for filing a referral with the Court, provided by Article 30 of the Constitution (See Case KO97/12).
36. Furthermore, the Court recalls that the Applicant alleges that he is challenging the constitutionality of the Decree and not the constitutionality of the International Agreement on which the Decree is based.
37. The Court notes that the President of the Republic of Kosovo is authorized to issue a decree under Article 84 (4) [Competencies of the President] of the Constitution which reads as follows: *“The President of the Republic of Kosovo: [...] (4) issues decrees in accordance with this Constitution; [...]*”.
38. In the present case, the Court refers to Articles 11 [Means of expressing consent to be bound by a treaty] and 13 [Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty] of the Vienna Convention on the Law of Treaties (23 May 1969) which read as follows:

“Article 11 - The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”

and

“Article 13 - The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when: (a) the instruments provide that their exchange shall have that effect; or (b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.”

39. The Court notes that the President of the Republic of Kosovo and the High Representative of the European Union exchanged letters in accordance with these provisions of the Vienna Convention on the Law of Treaties (23 May 1969).
40. In light thereof, the Court reiterates its findings in Case KO95/13 that in order for an international agreement to become part of the legal system of Kosovo the Assembly has to adopt a law on ratification by two third majority vote (See Case KO95/13, Applicant: *Visar Ymeri and 11 other deputies of the Assembly of the Republic of Kosovo* requesting constitutional review of Law No. 04/L-199, on Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of this Agreement, Judgment of 9 September 2013). In the present case, the Assembly adopted such a law on 23 April 2014 (see Law No. 04/L-274 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the EU Rule of Law Mission in Kosovo).
41. The Court emphasizes that the challenged Decree does not create new obligations. Rather, the Decree issued by the President is in line with the international obligations of the Republic of Kosovo incorporated in the International Agreement concluded between the Republic of Kosovo and the European Union and ratified by the Assembly. In this context, ratification of the International Agreement by the Assembly formalizes the consent of the State to be bound by the Agreement with respect to the other party, and the Decree of the President of Kosovo serves as an implementing act of those provisions of the International Agreement which are non-self-executing.
42. In this respect, the Court notes that the content of the Decree is *“Confirming the continuation of the mandate of the international judges of the Constitutional Court of the Republic of Kosovo.”* Thus, the Decree concerns the continuation of the mandate of the already appointed international judges who have been serving on the Court since 2009 and who were reappointed until 31 August 2014 by the ICR on 17 July 2012.
43. The Court emphasizes that Article 84 (19) [Competencies of the President] of the Constitution which reads as follows: *“The President of the Republic of Kosovo: [...] appoints judges to the Constitutional Court upon the Proposal of the Assembly; [...]”*, concerns the appointment of new Kosovar judges to the Court, whereas the Decree concerns the continuation of the mandate of the present international judges. Thus, Article 84 (19) of the Constitution is not applicable in the present case.
44. Furthermore, the Court recalls that for the appointment of the international judges in the Court a different procedure was followed and different

requirements were applied than for the appointment of the Kosovo judges. The mandate of the international judges is also different and has been determined by the contract provided by international stakeholders.

45. Finally, the Court observes that the Applicant's arguments are mainly related to the content of the International Agreement concluded between the Republic of Kosovo and the European Union through exchange of letters and ratified by the Assembly on 23 April 2014, although the Applicant alleges that he challenges the constitutionality of the Decree. Thus, the Applicant has not substantiated his claim and did not prove that the Decree is unconstitutional.
46. Furthermore, as the Applicant himself rightly points out, the Court does not have jurisdiction *ratione materiae* to deal with the question whether international agreements are compatible with the Constitution (See Case KO95/13, Applicant: *Visar Ymeri and 11 other deputies of the Assembly of the Republic of Kosovo* requesting constitutional review of Law No. 04/L-199, on Ratification of the First International Agreement of Principles governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of this Agreement, Judgment of 9 September 2013).
47. Consequently, as to the procedure followed by the President, the Court concludes that the Decree is compatible with the Constitution.
48. Therefore, the Court rejects the Referral as manifestly ill-founded, pursuant to paragraphs 1.c and 2 of Rule 36 of the Rules of Procedure.

Request for Interim Measures

49. As to the request for interim measures, the Court notes that the Applicant requests the Court to suspend the Decree of the President and not allowing the three international judges to continue "*their participation in decision making until the constitutionality of their appointment is secured.*"
50. Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, provide that "*when a referral is pending before the Court and the merits of the referral have not been adjudicated by the Court, a party may request interim measures.*"
51. The Court further refers to Rule 55 (4) of the Rules of Procedure, which provides:
 - (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.*

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

52. However, since the Applicant’s Referral is manifestly ill-founded and, therefore, inadmissible, the Court concludes that the request for interim measure can no longer be subject of review, and, therefore, it must be rejected.

FOR THESE REASONS

The Constitutional Court pursuant to Article 29 of the Law and paragraphs 1.c and 2 of Rule 36 of the Rules of Procedure, on 13 November 2014, unanimously

DECIDES

- I. TO DECLARE the Referral Inadmissible;
- II. TO REJECT the Request for Interim Measures;
- III. TO NOTIFY this Decision to the Applicant and the President of the Republic of Kosovo;
- IV. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20(4) of the Law;
- V. TO DECLARE this Decision effective immediately.

Judge Rapporteur



Arta Rama-Hajrizi



President of the Constitutional Court



Prof. Dr. Enver Hasani