



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

Pristine, 11 May 2012
Ref. No.: RK254/12

RESOLUTION ON INADMISSIBILITY

in

Case No. KI17/12

Applicant

Elez Hajdaraj

**Request for constitutional review of the Decision of the Government of Kosovo
nr. 12/59 of 01 February 2012**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Elez Hajdaraj (hereinafter: the Applicant) resident of village Shushica, Municipality of Istog.

Challenged decision

2. The challenged decision of the public authority allegedly violating the rights guaranteed by the Constitution of Kosovo is the Decision of the Government of Kosovo No. 12/ 59 of 1 February 2012, which was served on the applicant on 23 February 2012.

Subject matter

3. The subject matter of the Referral submitted with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) on 28 February 2012, is the constitutional review of the Decision of the Government, no. 12/59 of 1 February 2012, under which the applicant was discharged from the position of member of Board of the Regional Water Company (hereinafter: RWC) "Hidrodrini" JSC, headquartered in Peja.

Legal basis

4. Article 113.7 of the Constitution, Articles 22 and 27 of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009, and rules 54, 55 and 56 (2) of the Rules of Procedures of the Constitutional Court of Kosovo.

Proceedings before the Court

5. On 28 February 2012 the applicant submitted the Referral with the Court and the same has been registered under no. KI 17/12.
6. On 29 February 2012, the President, by Decision GJ.R. KI 17/12, appointed judge Altay Suroy as Judge Rapporteur, and by Decision KSH 17/12, appointed the Review Panel composed of Judges Ivan Cukalovic (presiding), Gjyljeta Mushkolaj (member) and Iliriana Islami (member).
7. On 5 March 2012, the Constitutional Court notified the Anti Corruption Agency related to the filed Referral.
8. On 5 March 2012, The Constitutional Court notified the Government of the Republic of Kosovo on the submitted Referral.
9. On 16 March 2012, the Anti Corruption Agency sent a reply in the Court regarding the request in which states that "Mr. Hajdaraj has been informed on time regarding the suspicions for existence of a conflict of interest as he has exercised the function of member of the Board of Directors and as "Officer in charge of the sector of water supply and sanitation", a situation that is contrary to the Law on Preventing Conflict of Interest in Exercising Public Function No. 02/-L-133 and Law on Public Enterprises No. 03-L-087. Whereas he has not undertaken any action within the legal

deadline to resolve this situation, therefore in compliance with its legal competencies this agency has proposed to the Government his removal from the function of the Board member in the Public Enterprise RWC “Hidrodrini” JSC- Peja.

10. On 20 March 2012, the Government of the Republic of Kosovo sent to the Court a reply to the notification explaining that the procedure for Mr. Elez Hajdaraj’s dismissal from the position of Board member of N.P. RWC “Hidrodrini”, was initiated by the Anti Corruption Agency, and that the Government had adopted the proposal of this Agency as grounded, thus the decision for dismissal was taken conform to the concluded situation by this agency that Mr. Hajdaraj did not eliminate the conflict of interest.
11. On 9 may 2012, the Review Panel, composed as in paragraph 6 of this Resolution, proposed to full Court the inadmissibility of the Referral.

Summary of facts

12. On 16 October 2008, the Office of the Permanent Secretary of Kosovo Government has published the vacancy for Director of the Boards of Central Public Enterprises in Kosovo public media, and among them in item 11, also for RWC “Hidrodrini” JSC - Peja.
13. On 24 December 2008, the Government of the Republic of Kosovo took the Decision No.12 /48 by which the Board of Public Enterprise RWC “Hidrodrini” JSC-Peja, appointed the following candidates: 1) Mr. Shkëlzen Hyseni –presiding, 2) Mr. Rexhë Abazi, 3) Mr. Elez Hajdaraj (the applicant in CCK) and 4) Mr. Kolë Berisha.
14. On 23 April 2009, the Government of the Republic of Kosovo took the Decision no. 10/16 of 24 December 2008 to appoint the members of the Board of Directors of RWC “Hidrodrini” JSC –Peja, by which the board member, Mr. Kolë Berisha is replaced with a new member, Mr. Gjelosh Gojani, while also based on this decision Mr. Elez Hajdaraj remains appointed to the position of a Board member of this public enterprise.
15. On 4 November 2009, the applicant sues RWC “Hidrodrini” with the Municipal Court in Istog for compensation of the income earned on the basis of work as board member. The Municipal Court in Istog registered this claim under C. No. 314/09.
16. On 28 December 2009, the respondent RWC “Hidrodrini” replied in the lawsuit of the applicant C. no. 314/09, by rejecting entirely the lawsuit as ungrounded. According to the respondent, under the contract of employment no.27 of 19 February 2009, in this company between the applicant and the respondent, the applicant Mr. Elez Hajdaraj, is appointed in the position “Head of the sector water supply and sanitation” and according to them a person can not receive double income by same enterprise.

17. On 24 September 2010, The Municipal Court in Istog, based on the Judgment C. no. 314/09, approves the lawsuit of the applicant and in this way the respondent is obliged within 15 days to compensate him the amount of 5.400, 00 Euro (five thousand And four hundred euros), earned on the basis of the work as a board member.
18. According to the documents attached to the Referral, could not be concluded the fact whether has been filed a complaint against this judgment.
19. On 17 May 2011, the Anti Corruption Agency had informed Mr. Elez Hajdaraj regarding the initiation of procedure to review the situation of conflict of interest related to the function of the applicant as a member of the Board of Directors in addition to his position as regular worker in the company RWC “Hidrodrini”.
20. On 20 July 2011, the Anti Corruption Agency had warned the Applicant again on the situation of conflict of interest, and requested by applicant to take all responsible steps, within 30 days, to avoid the conflict of interest.
21. On 1 August 2011, the Applicant replied to the Anti Corruption Agency noting that for certain purposes people within the company had falsified documents in which the applicant is appointed as ‘Officer”, and that in the position of member of Board of Directors he was appointed on the basis of the regular vacancy announcement.
22. On 6 October 2001, the Anti Corruption Agency by document no. AKK-DP-03/11, proposes to the Government of Kosovo **the dismissal** of Mr. Elez Hajdaraj from the position of Board member of RWC “Hidrodrini” JSC –Peja, because it is concluded the situation of his conflict of interest with the public enterprise where he is member of Board of Directors.
23. On 1 February 2012, the Government of Kosovo, according to the Decision 12/59, approves the request of the Anti Corruption Agency and decides to dismiss the applicant Mr. Elez Hajdaraj from the position of member of Board of Directors of RWC “Hidrodrini” JSC Peja, giving the reason as in the paragraph 12 of this report.

Applicant’s allegations on constitutional violations

24. The Applicant alleges that decision of the Government on his dismissal from the position of Board member in the public enterprise, violated his rights guaranteed by the Constitution as follows; Article 23 of the Constitution of the Republic of Kosovo (Haman Dignity) and Article 26 (Right o Personal Integrity), and from the Constitutional Curt requested the annulment of the Government Decision no. 12/59 of 1 December 2012, and also requested from Constitutional Court to “oblige” the Anti Corruption Agency to make a “public apology” through medias because of violation of his dignity.

Assessment of admissibility of the Referral

25. In order to be able to adjudicate the Referral of the Applicant, the Court needs first to examine whether the Applicant has fulfilled all admissibility requirements laid down in the Constitution, specified further by the Constitution, the Law and the Rules of Procedures.
26. In this relation it refers to the Article 113.7 of the Constitution which provides:

“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”.
27. The Court also considers Rule 36 paragraph 1 of the Rules of Procedures of the Constitutional Court where is clearly provides that the Court may only deal with Referrals if:
 - a) “All effective remedies that are available under the law against the Judgment or decision challenged have been exhausted”.
28. In order to verify whether the Applicant has fulfilled the admissibility criteria for exhaustion of legal remedies prior to addressing the issue with the Constitutional Court, the Court considers the legal provisions which regulate this legal matter and in particular the provisions of the Law on the State Administration of the Republic of Kosovo (Law no. 03/L-189), Law on the Administrative Procedure (Law no. 02/L-28), Law on Administrative Conflicts (Law no. 03/L-202) and Regulation No. 02/2011 on Fields of Administrative Responsibility of Office of Prime Minister and the Ministries, and that:

Law on the Administrative Procedure

Article 1.

- 1.1. The provisions of this Law shall be implemented by all bodies of public administration along exercising their functions through individual or collective administrative acts.

Law on state administration

Article 2

- 1.1. Highest state administration authorities-
The Government as a whole, the Prime Minister, the Deputy Prime Ministers and the ministers.
- 1.2. Highest state administration bodies- the Office of the Prime Minister and the Ministries are highest state administration bodies used by the respective Highest State Administration Authorities for implementation of their governmental and administrative responsibilities.

Article 4 Duties of State Administration

1. Duties of state administration are:
- 1.6. Setting up in administrative procedure the rights and obligations of citizens and legal entities;

Law on Administrative conflicts

Article 3 – Definitions

1. Terms used in this law have the following meaning:
 - 1.1. **Body** – public administration bodies, central government bodies and other bodies on their dependence, local government bodies and bodies on their dependence, when during exercising public authorization decide on administrative issues.
 - 1.2. **Administrative act** – every decision of the body foreseen in sub-paragraph 1.1 of this paragraph, which shall be taken in the end of the administrative procedure on exercising public authorizations and which effects, in favor or not in favor manner legally recognized rights, freedoms or interest of natural or legal persons respectively other party in deciding the administrative issues.

Article 11

Administrative conflict according to the indictment shall be solved by the Supreme Court of the Republic of Kosovo.

Article 13

1. An administrative conflict can start only against the administrative act issued in the administrative procedure of the court of appeals.
2. An administrative conflict can start also against the administrative act of the first instance, against which in the administrative procedure, complain is not allowed.
29. The Court wishes to emphasize that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or remedy the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide and effective remedy for the violation of constitutional rights (see *mutatis mutandis*, ECHR, *Selmouni v. French* no. 25804/94 Decision of 28 July 1999).
30. Regarding the issues raised related to the procedure developed by the Anti Corruption Agency and the raised doubt regarding the correct application of the Law on Prevention of Conflict of Interest in Exercising the Public Function (Law no. 03/L-155) and Law on Public Enterprises (Law no. 03/L-087), the Court notes that is not a court of verifying fact and wants to note that finding of fair and factual situation is full jurisdiction of regular courts and that the role of the Constitutional Court is only

to ensure compliance with rights guaranteed by the Constitution and other legal instruments, and therefore could not act as a “forth instance court” (see, mutatis mutandis Akdivar vs. Turkey, 16 September 1996 RJ. D. 1996-IV, par. 65).

31. Furthermore, in Article 102 [General Principles of Judicial System] item 3 of the Constitution, clearly provides that: “**Courts shall adjudicate based on the Constitution and the law**”.
32. In these circumstances the Referral **is inadmissible** because the Applicant did **not exhaust** all legal remedies prior to addressing the issue with the Constitutional Court, and the Applicant did not fulfill the criteria for admissibility of the Referral, therefore:

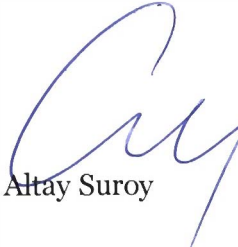
FOR THESE REASONS

Pursuant to Article 113.8 of the Constitution of the Republic of Kosovo, Article 47 of the Law on Constitutional Court and Rule 36 of the Rules of Procedure, the Constitutional Court on 9 May 2012, unanimously

DECIDES

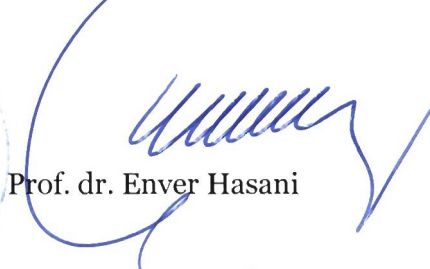
- I. TO REJECT the Referral as Inadmissible;
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law; and
- III. This Decision is effective immediately.

Judge Rapporteur



Altay Suroy

President of the Constitutional Court



Prof. dr. Enver Hasani