



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

Prishtina, 24 December 2012
No. ref.:MP334/12

DECISION ON INTERIM MEASURES

in

Case No. KO131/12

Applicant

Dr. Shaip Muja and 11 Deputies of the Assembly of the Republic of Kosovo

Constitutional Review of Articles 18, 19, 41 and 60 of the Law on Health No. 04/L-125, adopted by the Assembly on 13 December 2012.

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
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. Applicants are the Deputies of the Assembly of the Republic of Kosovo: Dr. Shaip Muja, Nait Hasani, Ramiz Lladrovci, Petar Miletic, Azem Syla, Time Kadrijaj, Xhevdet Neziraj, Kymete Bajraktari, Kurtan Kajtazi, Hydajet Hyseni, Sasa Milosavlevic and Sala Berisha.

Challenged law

2. The challenged law is the Law on Health No. 04/L-125, adopted by the Assembly of Kosovo on 13 December 2012.

Subject matter

3. The Applicants request to evaluate compliance of Articles 18, 19, 41 and 60 of the challenged law with the Constitution of the Republic of Kosovo.
4. The Applicants further request the Court to impose interim measures suspending the implementation of the Law until the Court makes the final decision on this Referral.

Legal matter

5. Article 113.5 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") and Article 38 of the Law on the Constitutional Court.

Proceedings before the Court

6. On 20 December 2012, by mail, Applicants submitted a Referral to the constitutional Court.
7. Attached to the Referral, Applicants have submitted to the Court copies of the Law on Labor (No.03/L-212), Law on Prevention of the Conflict of Interest in Exercising Public Function (No.02/L-133) and Law Against Discrimination, which according to the Applicants are related and relevant for the review of the submitted Referral.
8. On 21 December 2012, the Court, by official mail, received a copy of the Law on health, adopted by the Assembly of Kosovo.
9. The President of the Court appointed the Deputy-President Dr. Ivan Čukalović as Judge Rapporteur, and appointed the Review Panel composed of Judges Altay Suroy, Kadri Kryeziu and Arta Rama-Hajrizi.
10. On 21 December 2012, the Court communicated the Referral to the Assembly of the Republic of Kosovo and to the Applicants.
11. On 25 December 2012, in a closed session, the Review Panel reviewed the Referral and unanimously proposed to the Court admissibility of the Referral as well as request for interim measures.

Summary of facts

12. On 13 December 2012, the Assembly of the Republic of Kosovo (hereinafter: the "Assembly") adopted with 43 (forty-three) votes "for", 18 (eighteen) votes "against" and 3 (three) "sustained" the Law on Health.
13. On 27 November 2012, prior to Assembly's adoption of the Law in a Plenary session, the Legislation Committee of the Assembly of Kosovo had sent the **Recommendation (04/3239/I-125)** and under item I stated its position that the Draft-Law on Health, No. 04/L-125, cannot be proceeded for further review, suggesting to the Functional Committee on Health, Labor and Social Welfare review of amendments 1, 3, 12, 34, 48, 49, 50, 51 and 52.

14. On 17 December 2012, Kosovo's federation of Health Trade Union, submitted to the Ombudsperson a request to initiate proceedings on constitutional review of the Article 41 of the Law on Health, alleging that this Article is in contradiction with the Constitution.

Applicants' allegations

15. Applicants claim that, *inter alia*, the Law on Health contains provisions that puts healthcare employees in unequal positions to employees of other public institutions and thus in unequal position with employees of other public institutions before the law."
16. Applicants in particular challenge the contents of the following Articles:

Article 18 Primary healthcare

1. Primary healthcare shall be provided in compliance with the policies, plans and standards set by the sub-legal act issued by the Ministry.
2. Primary healthcare includes:
 - 2.1 Health promotion, prevention, early detection and diagnosing, treatment, and rehabilitation related to diseases, disorders and injuries, including small surgical interventions;
 - 2.2. Specific prevention of children and youth, in particular in primary, secondary and high schools in the territory of the municipality;
 - 2.3. Protection and advancement of public health, including seroprophylaxy, vaxio-prophylaxy, and chemo-prophylaxy in compliance with law, as well as systematic health education of the population;
 - 2.4. Promotion of oral health and dental healthcare;
 - 2.5. Early diagnosing and treatment of tuberculosis;
 - 2.6. Organization of emergency medical services as part of the unique system of emergency medical services.;
 - 2.7. Child and mother health care services and family planning.
 - 2.8. Mental health services.
3. Municipalities are responsible for public primary healthcare and for assessment of the health status of population in their territory.
4. The municipalities are obliged to implement, priority health promotive and health preventive measures of healthcare.
5. Primary healthcare services are provided and implemented within a framework of family medicine services, in a compliance with sub-legal act issued by the Ministry.

6. Constitution of a Family Medicine Team is set by the sub-legal act from paragraph 1 of this article.
7. Every citizen and resident with health difficulties is obliged to initially visit the family doctor, except in urgent cases.
8. Every citizen and resident should choose one family doctor.
9. Every citizen and resident has the right to choose and change the family doctor within his municipality
10. Primary healthcare professionals collaborate with health professionals in secondary and tertiary healthcare in compliance with this law;
11. In order to increase the quality of healthcare services, primary level healthcare institutions shall ensure inter-sector cooperation with social welfare and education services, public security authorities and specific professional organizations, as well as with governmental and nongovernmental humanitarian organizations.
12. Standards for organizing and functioning of the family medicine service shall be set by the sub-legal act from paragraph 1 of this article.
13. In order to support the family medicine services, the Ministry shall supervise and regulate the integrated services of primary healthcare, in compliance with this law

Article 19 **Secondary healthcare**

1. Secondary healthcare includes hospital, outpatient healthcare: diagnostic, therapeutic, rehabilitation, emergency transportation, and public healthcare.
2. Organization and activities of healthcare institutions from paragraph 1 of this article are defined by a sub-legal acts issued by the Ministry.

Article 41 **Preventing the conflict of interest**

1. Health professional employed in the public sector on full time or part time bases don't have the right to work in private healthcare institutions.
2. It is strictly prohibited to refer patients from a secondary and tertiary public healthcare institution to a private healthcare institution, for reasons that cannot be justified with medical arguments, regardless of the waiting list.
3. Any informal or formal financial or other type of award to the health professional employed in the public health sector including referral of the citizen or resident from public to private healthcare institution, and profitable relationship with pharmaceutical industry, is strictly prohibited.
4. Violators of the provisions of this article will be subject to penalties or legal action as defined in this law and a separate sub-legal act issued by the Ministry.

5. Public health institutions have the right to allow their health professional employees to exercise their private healthcare activities within the public health institution.
6. The private health activity from paragraph 5 of this Article shall be implemented on basis of the special sub-legal act issued by the Ministry.

Article 60 **Financing healthcare institutions**

- 1 Healthcare institutions, physical and juridical persons exercising healthcare activities are obliged, for each patient, to document the cost as well as the type, the volume, the quality and the price of health services.
 - 2 Healthcare institutions and organizations receiving public funds for implementation of healthcare are obliged to keep accounts and records based on the law, and to provide the necessary information to the authorized bodies.
17. Applicants allege that the Law on Health adopted by the Assembly is in contradiction with the European Conventions, which according to the Article 22 of the Constitution are directly applied in Kosovo, without specifying which conventions.
 18. Moreover, Applicants have alleged that provisions of the Law on Health, in particular Articles 18 and 19 are into open conflict with provisions of other laws such as Law on Public-Private Partnership and that this Law has contradictory provisions in its text.
 19. According to the Applicants, Article 41 of the Law on Health is in violation of the Article 49 of the Constitution, since it prohibits healthcare employees the guaranteed right to work and career choices.
 20. Finally, Article 60 of this Law, according to the Applicants is in open conflict with the Law on Public Enterprises, since it defines healthcare institutions as nonprofit institutions.

Assessment of the request for Interim Measures

21. Deciding of the request for interim measures the Constitutional Court refers to the Article 116.2 of the Constitution which stipulates:

"While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages."

22. Furthermore, the Court refers to the Article 27 items 1 and 2 of the Law on the Constitutional Court (No.03L-121) which provides:

1. *The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.*
2. *The duration of the interim measures shall be reasonable and proportionate.*

23. The Rules of Procedure of the Constitutional Court also specifies the requirements for imposition of the interim measures, in this respect, in order for the Court to grant interim measure pursuant to Rule 55 (4) of the Rules of Procedure, it must find, namely, 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; and

(..)

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

24. Having reviewed the Referral submitted by 12 deputies of the Assembly of Kosovo, the Constitutional Court finds that;

Article 51 [**Health and Social Protection**] of the Constitution of the Republic of Kosovo stipulates that:

1. Healthcare and social insurance are regulated by law.

25. Based on the abovementioned constitutional definition, the Constitutional Court establishes that health protection is a “human right guaranteed by the Constitution“ an part of the Chapter II of the Constitution, which refers to the human rights.
26. Moreover, the Court refers to the Article 21 item 1 of the Constitution which provides that: *“Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.”*
27. Being constitutional category the “Health protection” is certainly in public interest of Kosovo citizens, provided that at the same time it is an inalienable and inviolable human right of each individual.
28. In order to avoid the possible violation of the public interest and constitutional guaranteed right to a health protection, the Court considers that there are grounds for interim measures for a limited duration.
29. The Court also takes into account the fact that the Article 49 [**Right to work and exercise profession**] of the Constitution provides that:
1. The right to work is guaranteed.
2. Every person is free to choose his/her profession and occupation.
30. In order to avoid violation of this right guaranteed by the Constitution, the Court reiterates the need to impose interim measures for a limited duration.
31. Therefore, without prejudging the final outcome of the Referral, the request of the Applicant for interim measure is granted.

FOR THESE REASONS

The Court, pursuant to Article 116(2) of the Constitution and Article 27 of the Law, on 24 December 2012, unanimously/by majority

DECIDES

- I. TO GRANT interim measures;
- II. TO GRANT interim measures for a duration until 31 January 2012 from the date of the adoption of this Decision;
- III. TO IMMEDIATELY SUSPEND the implementation of the Articles 18, 19, 41 and 60 of the Law on Health, No. 04/L-125, of 13 December 2012, for the same duration;
- IV. This Decision shall be notified to the Parties; and
- V. This Decision shall be published in accordance with Article 20(4) of the Law and is effective immediately.

President of the Constitutional Court


Prof. Dr. Enver Hasani

