



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

Pristina, 16 December 2013
Ref. no.:RK523/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KO115/13

Applicants

**Ardian Gjini and eleven other deputies of the Assembly of the
Republic of Kosovo**

**Constitutional Review of the Conclusion No. 04-P-170 of the Assembly
Presidency of the Republic of Kosovo of 22 July 2013**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

Applicants

1. The referral was filed by Ardian Gjini, Daut Haradinaj, Ramiz Kelmendi, Time Kadrijaj, Kymete Bajraktari, Ramiz Lladrovci, Donika Kada-Bujupi, Ahmet Isufi, Xhevdet Neziraj, Teuta Haxhiu, Blerim Shala and Burim Ramadani; all of them are Deputies of the Assembly of the Republic of Kosovo.

Challenged decision

2. The Applicants challenge the constitutionality of the Conclusion of the Assembly Presidency of the Republic of Kosovo (hereinafter: the Assembly Presidency) No. 04-P-170 of 22 July 2013.

Subject matter

3. The subject matter of this referral is the Constitutionality of the Conclusion of the Assembly Presidency. Applicants argue that the challenged Conclusion is not in compliance with Article 67 of the Constitution.

Legal basis

4. The Referral is based on Articles 113.5 and 67 of the Constitution, and Article 42 of the Law and Rule 36 of the Rules of Procedure.

Proceedings before the Court

5. On 29 July 2013, the Applicants submitted the Referral to the Court.
6. On the same day, by Decision No.GJR. KO 115/13, the President appointed Judge Robert Carolan as Judge Rapporteur. Also, on the same day, by Decision No. KSH. KO 115/13, the President appointed the Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodriguez and Arta Rama-Hajrizi.
7. On 5 August 2013, the Court notified the Applicants that the referral had been registered with the Court.
8. On the same day, the Court notified the President of the Assembly of the referral and invited the Assembly to respond and/or submit any documents it considered necessary within the period of thirty days.
9. On 7 August 2013, the Court received the following documents from the President of the Assembly: transcript of the meeting of the Presidency held on 22 July 2013, minutes of the meeting of the Presidency also held on 22 July 2013 and Conclusion No. 04-P-170 dated 22 July 2013.

10. On 14 November 2013, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts presented by the Applicants:

11. After the elections of 2010, the Alliance for the Future of Kosovo (AAK) entered the Assembly with 13 Deputies forming the AAK Parliamentary Group, to be decreased later to 12 Deputy members after the withdrawal of Deputy Ukë Rugova.
12. After the same elections, the Vetëvendosje Movement entered the Assembly in a coalition with the Movement for Unification forming together a Parliamentary Group of 14 deputy members.
13. The Vetëvendosje Movement then became the third largest party and AAK the forth largest party in the Assembly of Kosovo.
14. In September 2011, the Movement for Unification, with its two Deputies, withdrew from the Parliamentary Group of Vetëvendosje.
15. On 5 July 2013, Deputy Alma Lama, publicly confirmed her withdrawal from the Parliamentary Group Vetëvendosje.
16. The withdrawals of two Deputies from the Movement for Unification and Deputy Alma Lama left the Vetëvendosje Parliamentary Group with 11 Deputy Members, one less than the AAK Parliamentary Group. At that moment, the AAK Parliamentary Group became third largest Parliamentary Group in the Assembly.
17. On 15 July 2013, the AAK Parliamentary Group filed a request in the Assembly Presidency, that reads as follows:

“Based on Article 67. 3 of the Constitution of the Republic of Kosovo as well as after the change of the number of MPs in the Parliamentary Groups, I request from you to conduct the procedures in accordance with the Constitution up to the appointment of a Deputy President of the Assembly from the lines of the Parliamentary Group of the Alliance for the Future of Kosovo.

Since the Rules of Procedure of the Assembly has not been harmonized with the Constitution, then the principle of legal hierarchy in Kosovo should be respected.

The order of speech, the seating order in the Assembly and the ranking in the official documents should be made according to the current political force in the Assembly.”
18. In the referral the Applicants submitted a copy of the request to the Assembly Presidency of 15 July 2013 and entitled it as an “evidence no.1.”

19. On 22 July 2013, the Assembly Presidency after reviewing the request rendered the challenged Conclusion that reads as follows:

"The Presidency does not support the request of the Parliamentary Group of the AAK on the appointment of the Deputy President of the Assembly among the MPs of this parliamentary group".

20. In support of their referral the Applicant also submitted a copy of challenged Conclusion of 22 July 2013 and entitled it as an "evidence no. 2."

Arguments Presented by the Applicant

21. The Applicants argue that the referral satisfies the admissibility requirements provided in Article 113.5 of the Constitution which reads as follows:

"Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed." [the Serbian version differs from the English and Albanian versions]

22. The Applicants, *inter alia*, claim that "the definition of the term 'the decision of the Assembly' as it used in Article 113.5 of the Constitution, was provided neither in the Constitution or in the Law on the Constitutional Court that govern the procedures provided by Article 113.5 of the Constitution..." The Applicants argue that it is necessary to analyze the constitutional and legal qualities of the Conclusion and of the body that rendered the Conclusion, the Assembly Presidency.
23. After a series of arguments in the referral, the Applicants concluded that the challenged Conclusion of the Assembly Presidency in the present case should be interpreted as a "...decision adopted by the Assembly...." described in Article 113.5 of the Constitution.
24. The Applicants argue that the Conclusion of the President of the Assembly is a decision on the constitutional rights of the political entity because it was rendered in response to the request of a parliamentary group for establishment of a right allegedly guaranteed by the Constitution.
25. Further, the Applicants allege that the Conclusion presents a decision, that has legal and constitutional consequences for a political entity in three ways:
- i. *The Conclusion presents a decision of a final nature that has to do with the issue and/or the constitutional right which is under*

exclusive jurisdiction of the Constitutional Court.

- ii. *The Conclusion cannot be appealed or become the subject of control of the regular courts, since it has to do with constitutional matters that are under the exclusive jurisdiction of the Constitutional Court.*
 - iii. *As a result, pursuant to items (i) and (ii) above, the Conclusion may be appealed only in the Constitutional Court.*
26. Finally, the Applicants argue that the decisions of the Assembly Presidency should be considered as a “...*decision adopted by the Assembly..*” in interpreting of Article 113.5 of the Constitution. In that respect the Applicants stated:

“We evaluated that the fact that the composition of the authority that has rendered the Conclusion reflects the composition of the Assembly, makes that the Conclusion has constitutional and legal qualities of “decision of the Assembly” as it is stipulated by Article 113.5 of the Constitution. Namely, pursuant to Article 67 of the Constitution, the Assembly presidency reflects the composition of the Assembly as the political strength and size of the parliamentary groups, represented in the Assembly. For this reason, in case when decision of the Assembly cannot be reviewed or become subject of deciding by the Assembly this decision for the purpose of Article 113.5 should be qualified as the Assembly decision.”

27. With regard to the merits of the case, the Applicants allege that after the withdrawal of three Deputy Members of the Parliamentary Group Vetëvendosje leaving it with a total of 11 Deputies, the AAK Parliamentary Group, with 12 Deputies, became the third largest party in the Assembly. Therefore, according to the Applicants, the AAK Parliamentary Group has the right to have its representative in the Assembly Presidency instead of the Parliamentary Group Vetëvendosje.
28. The Applicants also claim that the right derived from Article 67 of the Constitution “*belongs exclusively to the Parliamentary Groups and not individuals or political parties*” and that these groups are living bodies which may change at times in composition or size including the dissolution or creation of a new parliamentary group after the beginning of the legislature. In support of their argument they rely upon Article 20.2 of the Assembly Rules of Procedure. That rule states:

“... the Member of Assembly shall have the right to take part equally in a Parliamentary Group, leave the group, to form a new parliamentary group, join another group or act as an independent Member of Assembly”.

29. The Applicants also allege that:

"... the rights of the Parliamentary Groups are not acquired only by the establishment of the new legislature.... they become subject to the dynamics which goes through a parliamentary group during the duration of the legislature. This means that one Parliamentary Group which order is changes by its size, or which is dissolved, cannot continue to keep the posts that it had only because of its order or size at the moment such a post or the possibility to be proposed in such a post was given to a member of this parliamentary group."

30. The Applicants conclude that:

"... when changes occur in the ranking of the parliamentary groups 'the President of the Assembly and/or the Assembly Presidency are obliged ex-officio to initiate the proceedings to fill the vacant position with the candidate proposed by the parliamentary group that meets the constitutional and legal requirements, laid down in Article 67 of the Constitution."

Assessment of the Admissibility of the Referral

31. In order to determine whether this Referral can be considered by the Constitutional Court an assessment must be made as to whether it is admissible.

32. The Applicants made their Referral pursuant to Article 113.5 of the Constitution, which provides as follows:

"Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed".

33. The procedure for cases defined under Article 113. 5 of the Constitution is further elaborated in the Law on Constitutional Court, in particular Article 42 that defines Accuracy of the Referral, which states:

"1. In a referral made pursuant to Article 113, Paragraph 5 of the Constitution the following information shall, inter alia, be submitted:

- 1.1. names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;*
- 1.2. provisions of the Constitution or other act or legislation relevant to this referral; and*

1.3. presentation of evidence that supports the contest.”

34. The Court notes that the referral was made by 12 Deputies of the Assembly of Kosovo which is more than the minimum required by Article 113.5 of the Constitution.
35. The Court further notes that the challenged Conclusion was adopted on 22 July 2013 by the Assembly Presidency, and that referral was submitted on 29 July 2013, within the time limit prescribed by Article 113.5 of the Constitution.
36. The question posed by this referral is whether the Conclusion of the Assembly Presidency is a “... *decision adopted by the Assembly...*”
37. Article 113.5 of the Constitution only allows the Constitutional Court to decide the Constitutionality of “... *any law or decision adopted by the Assembly...*”. It does not authorize the Court to decide whether other internal acts or decisions of the Assembly are compatible with the Constitution.
38. Article 80.1 of the Constitution defines how decisions are adopted by the Assembly as follows:

“...decisions...are adopted by the Assembly by a majority vote of deputies present and voting, except when otherwise provided by the Constitution.”
39. There are no other provisions in the Constitution defining decisions adopted by the Assembly.
40. The Court further notes that Article 70.1 of the Constitution provides:

“Deputies of the Assembly are representatives of the people and are not bound by any obligatory mandate.”
41. Therefore, the Deputies of the Assembly are representatives of the people with an individual mandate, and the Assembly they form has the legislative power as specified in Article 4.2 of the Constitution.
42. Article 67.6 of the Constitution provides that:

“The Presidency is responsible for the administrative operation of the Assembly as provided in the Rules of Procedure of the Assembly”.
43. Therefore, the mandate of the Deputies of the Assembly and the authority of the Assembly is distinguishable from the responsibility and the authority of the Presidency of the Assembly.

44. In this respect the Court would like to recall that the mandate of the Deputies was already addressed in its Judgment of 30 March 2011 (the Case No.KO 29/11, Sabri Hamiti and other Deputies) as follows:

“79. In this respect, the Court refers to Article 70 [Mandate of Deputies] of the Constitution, stipulating that the ‘Deputies of the Assembly are representatives of the people [... Furthermore, as to their obligation as deputies, Article 74 [Exercise of Function] of the Constitution provides that ‘the deputies of the Assembly of Kosovo shall exercise their function in the best interest of the Republic of Kosovo and pursuant to the Constitution, Laws and Rules of Procedure of the Assembly.’

45. Moreover, in the Judgment in case No KO -98/11 Concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo, the Court recalls that:

“88. The Constitution also uses the term “mandate” in relation to the deputies of the Assembly whereby as representatives of the people they are not bound by any obligatory mandate. Each deputy has an individual mandate which commences on the date of the certification of the results of the election. While the mandate of the Assembly commences on the constitutive session of the newly elected Assembly the mandate of each deputy may commence earlier. The mandate for a deputy ends at the occurrence of any of the circumstances set out in Article 70 (3) of the Constitution. The mandate of the deputy embodies his/her representative function. “

46. The “decision” of the Presidency of the Assembly, is different than a decision of the Assembly requiring a majority vote of the deputies present and voting.
47. In order for an act of the Assembly to be a decision, it has to go to the voting process in the Assembly as foreseen by Article 65.1 of the Constitution.
48. The Conclusion of the Presidency, dated 22 July 2013, was not adopted by a majority vote of the members of the Assembly.
49. It should also be noted that, as prescribed by Article 67 of the Constitution, while three Deputy Presidents are proposed by the three largest Parliamentary Groups, they must actually be elected by a majority vote of all deputies as prescribed in Article 67.3 of the Constitution.
50. Therefore, the Court’s jurisdiction, or authority, to interpret Constitutional referrals cannot be extended to include internal acts of the Assembly’s bodies or decisions of individual members or officers of the Assembly.

51. Bearing all these matters in mind the Court concludes that the Referral, therefore, is inadmissible because it is incompatible *ratione materiae* with the Constitution.

FOR THESE REASONS

The Constitutional Court therefore, pursuant to Article 113.5 of the Constitution, Articles 20 of the Law and Rule 36 of the Rules, on 14 November 2013:

DECIDES

- I. Unanimously, to reject the Referral as inadmissible;
- II. By majority, to reject the Referral as inadmissible because it is incompatible *ratione materiae* with the Constitution;
- III. This Decision is to be notified to the Applicants, the President of the Assembly of Kosovo;
- IV. This Decision shall be published in the Official Gazette in accordance with Article 20(4) of the Law; and
- V. This Decision is effective immediately.

Judge Rapporteur



Robert Carolan

President of the Constitutional Court



Prof. Dr. Enver Hasani

