



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

Pristina, 9 September 2013
Ref.no.:RK470/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KO118/13

Applicants

Albana Fetoshi and 12 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of the Law, No. 04/L-201, on Amending and Supplementing Law, No. 04/L-165, on Budget of the Republic of Kosovo for Year 2013

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

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

Applicants

1. The Applicants are Albana Fetoshi, Visar Ymeri, Albulena Haxhiu, Albin Kurti, Liburn Aliu, Albana Gashi, Afrim Kasolli, Glauk Konjufca, Afrim Hoti, Rexhep Selimi, Emin Gërbeshi, Agim Kuleta and Muhamet Mustafa, all of them deputies of the Assembly of the Republic of Kosovo. Before the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court"), the Applicants have authorized Ms Albana Fetoshi to represent them.

Challenged law

2. The Applicants challenge Law, No. 04/L-201, on Amending and Supplementing Law No. 04/L-165 on Budget of the Republic of Kosovo for Year 2013 (hereinafter: the Amended Law on Budget), which was adopted by the Assembly of the Republic of Kosovo (hereinafter: the “Assembly”) on 25 July 2013.

Subject matter

3. The Applicants request the Court to review the constitutionality and legality of the Amended Law on Budget, which was adopted by the Assembly, by Decision No. 04-V-671 of 25 July 2013.

Legal basis

4. Article 113.5 of the Constitution of the Republic of Kosovo (hereinafter: the “Constitution”), Articles 42 and 43 of the Law, No. 03/L-121, on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (hereinafter: the “Law”), and Rule 36 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the “Rules of Procedure”).

Proceedings before the Court

5. On 1 August 2013, the Applicants submitted their Referral to the Court.
6. On 1 August 2013, the President of the Court, by Decision No. GJR. KO118/13, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Court, by Decision No. KSH. KO118/13, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Ivan Čukalović.
7. On 2 August 2013, the Court notified the President of the Assembly and the Government of the Republic of Kosovo (hereinafter: the “Government”) of the submission of the Referral by the Applicants to the Court and asked them to submit their comments as well as any documents they would deem necessary in respect of the Referral.
8. On the same day, the President of the Republic of Kosovo was informed about the Referral submitted by the Applicants to the Court.
9. On 7 August 2013, the Court received the following documents from the President of the Assembly of the Republic of Kosovo:
 - a. The final report of the Committee for Budget and Finance of 19 July 2013 in respect to the Draft Amended Law on Budget.
 - b. The transcript of the plenary session of the Assembly of 25 July 2013.

- c. The minutes from the plenary session of the Assembly of 25 July 2013.
 - d. The electronic voting register.
 - e. The Decision of the Assembly of 25 July 2013 on Adopting Amended Law on Budget (Decision No. 04-V-671).
 - f. A copy of Amended Law on Budget.
10. On 29 August 2013, the Government submitted to the Court their comments in respect of Case KO118/13.
 11. On 30 August 2013, the Applicants were informed about the Government's comments.
 12. The Review Panel considered the Report prepared by the Judge Rapporteur, Judge Snezhana Botusharova, and made a recommendation to the full Court.
 13. On 2 September 2013, the Court deliberated and voted on the Referral.

Summary of facts

14. On 17 June 2013, the Government decided to approve the Draft Amended Law on Budget and instructed the Secretary General of the Office of the Prime Minister to present the Draft-Law to the Assembly for review and adoption.
15. On 18 June 2013, the President of the Assembly sent to all Deputies of the Assembly the Draft-Amended Law on Budget. Furthermore, the Committee for Budget and Finance was assigned to review the Draft–Amended Law on Budget and to present to the Assembly a report with recommendations.
16. On 26 June 2013, the Committee for Budget and Finance reviewed the Draft Amended Law on Budget and recommended the Assembly to approve this draft law in the first reading.
17. On 11 July 2013, pursuant to Article 65.1 of the Constitution and Articles 58 and 84 of the Rules of Procedure of the Assembly, the Assembly, by Decision No. 04-V-646, in the first reading adopted in principle the Draft Amended Law on Budget by 49 votes in favor, 35 against and no abstention.
18. On 19 July 2013, the Committee for Budget and Finance reviewed the Draft Amended Law on Budget for a second time and recommended the Assembly to approve this draft law in the second reading.
19. On 25 July 2013, pursuant to Article 65.1 of the Constitution and Articles 58 and 84 of the Rules of Procedure of the Assembly, the Assembly, by Decision No. 04-V-671, in the second reading adopted the Draft Amended Law on Budget by 51 votes in favor, 31 against and 2 abstentions.

20. On 1 August 2013, pursuant to Articles 113.5 of the Constitution and Articles 42 and 43 of the Law, the Applicants submitted a Referral to this Court for the constitutional review of the Amended Law on Budget challenging its substance.

Arguments presented by the Applicants

21. The Applicants consider that Article 2 of the Amended Law on Budget, which reads as follows *“All public money collected from goods imported by businesses registered in North Mitrovica, Zubin Potok, Leposaviq or Zvecan, with a destination for consumption in these municipalities upon entering into Kosovo through Jarinje (gate I) or Brnjak (gate 31) are required to be sent to the Kosovo Fund and separately identified and accounted for in KFMIS, are hereby appropriated to the Development Trust Fund that is to be established by the EUSR in a commercial bank.”*, violates the Constitution.
22. They allege that the abovementioned Article violates Article 119.4 [General Principles] of the Constitution, reading: *“The Republic of Kosovo promotes the welfare of all of its citizens by fostering sustainable economic development.”*
23. In the Applicants’ view, *“[...] the term promotes the welfare of all of its citizens and expresses the spirit of equality and non-discrimination of all citizens before the law and the commitment of state authorities without distinction to any affiliation of citizens. So, the promotion of the welfare of every citizen expresses the equal commitment, without any distinction, by the state authorities, in the sense of economic relations, which includes all economic aspects starting from macro-economic factors until the creation of micro-economic conditions.”*
24. The Applicants refer further to Article 3, paragraphs 1 and 2, of the Constitution reading:

“1. The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.”

“2. The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members.”

In their opinion, *“The state by guaranteeing the equality in public access, in this case the promotion of the welfare of citizens, should take care that this approach does not violate the individual and collective rights of any community within the territory of the Republic of Kosovo.”* In this respect, according to the Applicants, *“In this particular case, it is impossible that the Development Trust Fund is in compliance with the principle of equality that is expressed with the provisions of this constitutional paragraph.”*

25. The Applicants allege also that Article 2 of the Amended Law on Budget violates Article 120.1 [Public Finances] of the Constitution. Article 120.1 reads: *“Public*

expenditure and the collection of public revenue shall be based on the principles of accountability, effectiveness, efficiency and transparency.”

26. In the Applicants' view, under this Article there exist a “[...] constitutional obligation that expenses and collection of public revenue should be grounded on the principles of accountability.”, whereby accountability includes “[...] the responsibility of budgetary organizations (namely state authorities that have the competencies to manage public finances) that they adapt all their actions pursuant to the constitutional-legal standards on the grounds of which is conceptualized the responsibility of these budgetary organizations.” and “[...] responsibility of the authority that reports on its financial activities and to do so pursuant to the legal regulations grounded on the constitutional principles that are mentioned above.”
27. In this connection, the Applicants argue that the provisions of the Amended Law on Budget must always be in compliance with the norm derived from Law No. 03/L-048 on Public Financial Management, that “*Public money shall only be used for approved public purposes. No public authority, budget organization, person or undertaking may divert, misapply, improperly dispose of or improperly use public money.*” (see Article 17 of the Law on Public Financial Management). Therefore, according to the Applicants, the use and allocation of these public means can only be done through a preliminary approval defined by a general act adopted by the Assembly.
28. The Applicants further state that in no way can a special fund be established due to the centralization of the allocation of financial means by the Kosovo Budget based on Article 17.2 of the Law on Public Financial Management which reads as follows: “*An expenditure or other use of public money shall only occur from appropriated and allocated funds and only in conformity with the process that, in accordance with paragraph 2 of Article 38 of this Law, has been established by the FMC Rules.*”
29. Therefore, in the Applicants' opinion, the tax revenues should be allocated to accounts that are part of the Treasury Single Account comprising all accounts and sub-accounts that are kept at the Central Banking Authority of Kosovo, pursuant to Article 18.1 of the Law on Public Financial Management which reads as follows: “[...] *All such accounts and sub-accounts shall be part of the Treasury Single Account. All payments and expenditures of public money shall be made through the Treasury Single Account.*” Thus, according to the Applicants, the establishment of the Development Trust Fund in any commercial bank is in contradiction with this provision.
30. The Applicants maintain that “*Law No.03/L-048 on Public Financial Management and Accountability has not envisaged the possibility of allocating financial means without a preliminary project by a budgetary organization pursuant to the Law on Budgetary Allocations, such financial means cannot be registered in the KFMIS (Kosovo Financial Management Information System) and then allocated to an account, let alone in an account that is not part of the TSA.*”

31. The Applicants further note that, “[...] *the provisions of paragraph 9 of Article 20 of the Law on Public Financial Management in conjunction with the Preparation and Review of Proposed Budgets and Appropriation Requests does not envisage the legal opportunity to initiate the budgetary review that includes the establishing of a Fund and the allocation of means to a special fund.*” In this respect, they refer to Article 20.9 reading as follows:

[...]

20.9 The proposed Appropriations Law shall establish appropriations for all budget organizations and shall set out:

a) in the case of an appropriation for a budget organization, the classification of each such expenditure in accordance with the applicable classification methodology, including actual aggregate expenditures for the previous fiscal year, and estimated actual aggregate expenditures for the current fiscal year;

b) in the case of an appropriation for a payment related to a debt permitted by the present law, the amount (if any) appropriated:

(i) for the payment of interest, or other amount in the nature of interest, on the debt;

(ii) for the repayment of the principal amount of the debt;

(iii) for the payment of penalties or other amounts assessed for late payment, if any; and

(iv) for the payment of any other amounts in respect of the debt, if any; and

c) in the case of contingency expenditures, a proposed appropriation not exceeding five percent (5%) of total expenditures.

[...]”

32. The Applicants further allege that Article 2 of the Amended Law on Budget emphasizes that the establishment of the Development Trust Fund will be done by the EU Special Representative in Kosovo. They maintain that the EU Special Representative does not have constitutional authorization to establish such a fund and that this would be in violation of Article 4 [Form of Government and Separation of Power] of the Constitution because “*the provisions of the Article clearly define the principles on which the form of governing the state power in the Republic of Kosovo is based, including the separation of such powers in the legislative, executive and judicial field.*” They maintain that “*Such a competence violates the attribute of executive power as defined in the provisions of paragraph 4 of this Article, as well as the provision of Article 92, paragraphs 2 and 3 in conjunction with Article 93, item (6) and (7) of the Constitution of Kosovo.*” since “[...] *the establishment of this Fund is an executive quality inalienable from the executive power and as such is a constitutional category pursuant to Article 4, paragraph 4, and Article 92, paragraphs 2 and 3, of the Constitution.*”

Arguments presented by the Government

33. The Government states that the *“[...] establishment of the Development Trust Fund, that has as a purpose the development of the Municipalities North Mitrovica, Zubin Potok, Leposaviq and Zvecan [...] is in accordance with Article 58 of the Constitution of the Republic of Kosovo and such a measure cannot be considered as discriminatory by the rest of the society. The purpose of this measure is exactly the integration of this community in the economic, social, political and cultural life of the Republic of Kosovo through enhanced economic development of these municipalities belonging to the Serb minority and promoting a full and effective equality between the members of communities.”*
34. Furthermore, the Government considers that *“[...] the provisions of this law are fully consistent with the unitary character of the Republic of Kosovo in terms of revenue collection, as they are collected in the same manner in all border points of the Republic of Kosovo, in accordance with the same legislation in force in the Republic of Kosovo and sent to the Fund of Kosovo.”*
35. In addition, the Government notes that *“Based on the conclusions of the Working Group on Customs between Serbia and Kosovo intermediated by EU, dated 10-17 January 2013, is envisaged the establishment of the Development Trust Fund [...]”, which will be “[...] supervised by a Commission composed of Ministry of Finance, EUSR and a Kosovo Serb representative.”*

Admissibility of the Referral

36. In accordance with Article 113.5 of the Constitution, the task of the Court is to review whether the substance of the contested law is in violation of the Constitution as alleged by the Applicants. In this respect, the latter submit that the contested Law violates Articles 3.1 and 3.2, 4, 19.4, 92.2 and 92.3, 93.6 and 93.7, 119.4 and 120.1 of the Constitution and various provisions of Law No. 03/L-048 on Public Financial Management.
37. In this connection, the Court observes that, when a law or an act is under review under Article 113.5 of the Constitution, the review procedure will be of a suspensive nature in that the law will be barred from being promulgated until the Court has taken a final decision on the case. In accordance with Article 43 (2) of the Law, in the event that a law adopted by the Assembly is contested under Article 113.5 of the Constitution, *“such a law [...] shall be sent to the President of the Republic of Kosovo for promulgation in accordance with the modalities determined in the final decision of the Constitutional Court on this contest.”*, meaning that the adopted Law should not be returned to the Assembly but should be forwarded to the President of the Republic of Kosovo for promulgation of the Law without the Articles which have been declared incompatible with the Constitution by the Court in its Judgment.
38. As to the Applicants’ claim that the contested Law infringes the provisions of Law No. 03/L-048 on Public Financial Management, the Court reiterates its view that, by virtue of Article 112 [General Principles] of the Constitution, it is only competent to review the constitutionality of a contested law, but not its

legality. It follows that this part of the Referral is outside the jurisdiction of the Court under Article 112 of the Constitution and is, therefore, incompatible *ratione materiae* with the Constitution.

39. As to the Applicants' allegations that the contested Law infringes paragraphs 1 and 2 of Article 3 [Equality before the Law], paragraph 4 of Article 19 [On General Principles] and paragraph 1 of Article 120 [Public Finances] of the Constitution, the Court refers to paragraph 1.3 of Article 42 [Accuracy of the Referral] of the Law on the Constitutional Court, providing that the following information shall, inter alia, be submitted: "*presentation of evidence that supports the contest.*"
40. In the present case, the Court notes that the Applicants have only argued in the abstract the alleged unconstitutionality of the contested Law, but have not substantiated in a convincing manner that the contested Law would violate each of the Articles of the Constitution invoked by them and have not presented evidence in support of their allegations.
41. As to the alleged violation of Article 120 of the Constitution, providing that: "*Public expenditure and the collection of public revenue shall be based on the principles of accountability, effectiveness, efficiency and accountability*", the Applicants stated what accountability in this case should include and how a state authority could report on its actions without the existence of the obligation to act in a specific way.
42. Regarding this complaint, the Court is of the opinion that the Applicants have neither built a case on a violation of the rights invoked by them, nor have they submitted prima facie evidence on such violations (see, Vanek v. Slovak Republic, Application no. 53363/99, ECtHR Decision on Admissibility of 31 May 2005, and Case KI 70/11, Applicants Faik Hima, Magbule Hima, Bestar Hima, Resolution on Inadmissibility of 13 December 2011).
43. It follows that this part of the Referral is manifestly ill-founded, pursuant to Rule 36.1(c) of the Rules of Procedure which provides that: "*The Court may only deal with Referrals if: c) the Referral is not manifestly ill-founded.*"
44. Finally, the Applicants allege that the establishment of the Development Trust Fund by the EUSR (European Union Special Representative), as mentioned in Article 2 of the contested Law, violates Articles 4 [Form of Government and Separation of Powers] as well as paragraphs 2 and 3 of Article 92 [General Principles] and paragraphs 6 and 7 of Article 93 [Competencies of the Government] of the Constitution. In their view, the EUSR does not have "constitutional authorization" under those Articles to establish such a special fund, since, pursuant to these constitutional provisions, this is an inalienable competence of the executive power.
45. In this respect, the Court notes that Article 2 of the contested Law provides that: "*All public money collected from goods imported by businesses registered in North Mitrovica, Zubin Potok, Leposaviq or Zvecan, with a destination for consumption in these municipalities upon entering into Kosovo through Jarinjje (gate I) or Brnjak (gate 31) are required to be sent to the Kosovo Fund*

and separately identified and accounted for in KFMIS and are hereby appropriated to the Development Trust Fund that is to be established by the EUSR in a commercial bank.”

46. As to the Applicants’ complaint, the Court observes that the above Article does not define any modalities regarding the establishment of the Development Trust Fund by the EUSR, let alone that it could be interpreted as a clear delegation of executive powers from the Government to the EUSR. The Court, therefore, finds that the allegations of the Applicants, that the above constitutional provisions are violated, are not sufficiently substantiated, since they have not presented any convincing evidence that supports those allegations, as required by Article 42.1.3 of the Law on the Constitutional Court.
47. Furthermore, the Court notes that the Government of the Republic of Kosovo undertook financial obligations with the First International Agreement of Principles Governing the Normalization of Relations between Republic of Kosovo and Republic of Serbia. In point 12 of this Agreement, it is stated that *“An implementation plan including time frame shall be produced by April 26. In implementing this agreement the principle of transparent funding will be addressed.”*, while in point 15 it is provided that *“An implementation committee will be established by the two sides, with the facilitation of the EU”*. Moreover, the implementation plan under point 6 [General Provisions] *inter alia* provides that *“[...] method of accomplishing principles for transparent funding will be defined by the two sides in the implementation committee”*.
48. In this respect, the Court notes that similarly to this situation, an issue was raised by a group of deputies before the Constitutional Court of the Federal Republic of Germany concerning the question whether the permanent bailout fund which the eurozone nations had established (the European Stability Mechanism) was in compliance with the German Constitution. This was a consequence of the financial obligations of Federal Republic of Germany derived from the Maastricht Treaty, where *“[...] the parties agreed to a common monetary policy of the Member States, which was intended in stages to create a European monetary union and finally to communitarise the monetary policy in the hands of the European System of Central Banks (ESCB). In the third stage of this process, the euro was introduced as the single currency.”*
49. The German Constitutional Court stated that it cannot be established that the amount of the guarantees given exceeds the limit of budget capacity to such an extent that budget autonomy would virtually be rendered completely ineffective.
50. Therefore, the German Constitutional Court rejected as unfounded the constitutional complaints of the group of deputies which were directed against German and European legal instruments and other measures in connection with the aid to Greece and with the euro rescue package (see, Judgment 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 of 12 September 2012).
51. The Court notes that the Constitution provides that the Government and they alone may determine the national budget. In this respect, by adopting Law, No.

04/L-201, on Amending and Supplementing Law, No. 04/L-165, on Budget of the Republic of Kosovo for Year 2013 the Assembly did not impair in a constitutionally impermissible manner its right to adopt the budget and control its implementation.

52. Taking the Applicants' complaints as a whole, the Court concludes that the Referral must be rejected as manifestly ill-founded, pursuant to Rule 36.1(c) of the Rules of Procedure.
53. However, the Court notes that if in further phases of the implementation of this Law, constitutional issues arise, authorized parties may submit such issues to this Court.

FOR THESE REASONS

The Constitutional Court therefore, pursuant to Article 113.5 of the Constitution, Article 20 of the Law and Rule 36 of the Rules, on 2 September 2013, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO DECLARE that pursuant to Article 43 of the Law, this law adopted by the Assembly of the Republic of Kosovo shall be sent to the President of the Republic of Kosovo for promulgation;
- III. TO NOTIFY this Decision to the Applicants, the President of the Republic of Kosovo, the President of the Assembly of Kosovo and the Government 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

Snezhana Botusharova

President of the Constitutional Court

Prof. Dr. Enver Hasani

