



REPUBLIKA E KOSOVËS – РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, 26 August 2014
Ref. No.: MM701/14

Case No. KO119/14

Applicants

Xhavit Haliti and 29 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of Decision No. 05-V-001 of the Assembly of the Republic of Kosovo on the election of the President of the Assembly of the Republic of Kosovo, dated 17 July 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
Arta Rama-Hajrizi, Judge

DISSENTING OPINION of JUDGE ROBERT CAROLAN

The conclusion and reasoning of the majority in this case is wrong because it misinterprets specific language of the Constitution. It also erroneously attempts to answer questions that, as a Constitutional Court, it does not have the authority to answer. In doing so, it reaches erroneous conclusions with respect to the facts of the case and the applicable law and rules and procedure of the Assembly of the Republic of Kosovo.

With respect to the election of the President of the Assembly on 17 July 2014 the Applicants ask this Court the following questions:

- a. *Was the President elected by the Assembly proposed by the “largest parliamentary group” as prescribed by Article 67.2 of the Constitution of the Republic of Kosovo?*
- b. *Who has the right to propose the candidate for President of the Assembly during the constitutive session of the Assembly? Is it the political party or coalition that won the most votes in the election for the Assembly of 8 June 2014 or the largest group that has been formed during the registration of the deputies?*
- c. *Did the President of the Assembly from the previous legislative Assembly violate the Constitution during the preparatory meeting on 07.12.2014 for the constitutive session of the Assembly on 17 July 2014?*
- d. *During the constitutive session of the Assembly of the Republic of Kosovo was there a violation of the Constitution and the Rules of Procedure of the Assembly?*

Assessment of Admissibility

This referral is made pursuant to Article 113.5 of the Constitution. Article 113.5 provides:

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 Constitution specifically limits what questions deputies of the Assembly may ask the Constitutional Court to interpret. Those questions are limited to either laws or decisions of the Assembly, not other actions in the Assembly or actions of individual deputies or officers in the Assembly.

Insofar as this referral challenges whether the decision of the Assembly electing Mr. Isa Mustafa as President of the Assembly complied with Article 67 of the Constitution, it is admissible, and this Court has the authority to answer that question. Because this part of the referral challenges a decision of the Assembly and asks this Court to interpret a term used in the Constitution, this referral is admissible under Article 113.5 of the Constitution.

Other issues raised in the referral challenge whether the President of the Assembly or the Chairperson of the Assembly acted in accordance with the Constitution in the procedural process ultimately resulting in the election of Mr. Mustafa as President of the Assembly. Because that aspect of the referral does not challenge a decision of the Assembly, but rather actions of an Assembly official, the Applicants do not have the authority under Article 113.5 of the Constitution to ask this Court to interpret that question. See *Ardian Gjini and eleven other Deputies of the Assembly of the Republic*

of Kosovo, KO115/13, 16 December 2013. Therefore, that part of the referral is inadmissible and the Court does not have the authority under the Constitution to answer that question.

The referral also challenges whether the action of certain members of the Assembly on 17 July 2014 complied with either applicable law or the Rules of Procedure of the Assembly. For example, the referral alleges that the Assembly was adjourned when Mr. Mustafa was elected President of the Assembly. The Responding Deputies allege that the Assembly was still properly and legally in session when Mr. Mustafa was elected and that the Chairperson of the Assembly at the time improperly and illegally attempted to adjourn the session of the Assembly. Because the Constitution does not discuss when and how sessions of the Assembly can be adjourned, this Court has no authority to decide both the factual and procedural issues in dispute between the parties on this issue. For example, Article 50(2) of the Rules of Procedure for the Assembly requires that motions to adjourn a session of the Assembly must be approved by at least one parliamentary group. There could be a question whether the chairperson followed that rule on 17 July 2014. That dispute is properly resolved either by the Assembly or a similar legal forum, not the Constitutional Court. Because these allegations are not constitutional challenges, the Court does not have the authority to answer that question. Therefore, that aspect of the referral is also inadmissible.

Assessment of the Merits of the Referral

During the constitutive session of the Assembly on 17 July 2014 the Chairperson of the Assembly asked the largest political party in the Assembly, the Democratic Party of Kosovo (PDK), to propose a candidate to be elected as President of the Assembly. A representative of PDK then nominated Mr. Agim Aliu for that position. Mr. Aliu, however, was never elected President by a majority of all deputies of the Assembly.

Mr. Isa Mustafa was subsequently nominated by a group from the political parties Democratic League of Kosovo (LDK), Alliance for Future of Kosovo (AAK), Vetëvendosja (VV) and the political movement, NISMA for the position of President of the Assembly. When a vote was taken, Mr. Isa Mustafa was then elected by receiving 65 votes, more than the majority required to be elected as President of the Assembly.

Applicants' claim that their political party, with 37 members in the Assembly, is the "largest parliamentary group" in the Assembly because their political party received the most popular votes in the election of 8 June 2014.

The responding deputies representing a coalition formed on 8 July 2014 consisting of 47 members in the Assembly allege that they are the "largest parliamentary group" in the Assembly.

Both the Applicants and the Responding Deputies agree that the President of the Assembly shall be proposed by the "largest parliamentary group." They also agree that the President of the Assembly must be elected by a majority vote of all deputies of the Assembly. Therefore, the constitutional issue presented by this referral is who is authorized to propose a candidate for President of the new Assembly when it is formed. The constitutional answer to that question depends on the constitutional

meaning of “largest parliamentary group” as it is used in Article 67(2) of the Constitution.

Article 67(2) of the Constitution provides:

The President of the Assembly is proposed by the largest parliamentary group and is elected by a majority vote of all deputies of the Assembly. (Emphasis added.)

When Article 67(2) of the Constitution was adopted on 9 April 2008, it is quite likely that the drafters of the Constitution were aware of Article 9.1.9 of the Constitutional Framework of Kosovo adopted approximately eight years earlier on 15 May 2001. It specifically provides:

President of the Assembly

9.1.9 A member of the Presidency from the party or coalition having obtained the highest number of votes in the elections for the Assembly shall be the President of the Assembly. (Emphasis added.)

The Constitutional Framework clearly provided that the President of the Assembly shall be a member of the party or coalition that obtained the highest number of votes in the elections for the Assembly. When the drafters of the Constitution drafted Article 67 they specifically rejected that provision of the Constitutional Framework by requiring that the candidate for President of the Assembly be proposed by the largest parliamentary group, not the party or coalition that received the most popular votes in the recent elections. Unlike the Constitutional Framework which merely designated that a member of the party or coalition that had the greatest number of votes in the elections shall be the President of the Assembly, the drafters of the Constitution required that the President of the Assembly must also be elected by a majority vote of the members of the Assembly. Because the drafters of the Constitution specifically rejected the language in the Constitutional Framework and because the Constitution now requires that the candidate proposed to be the President of the Assembly must also be elected by a majority vote of the members of the Assembly it is clear that the drafters of the Constitution meant that the “largest parliamentary group” in the Assembly was not solely the party or coalition that received the largest number of popular votes in the previous election, but rather, the largest group in the Assembly that could successfully elect the President.

The constitutional issue in this referral is distinguishable from the constitutional question decided in this Court’s judgment in *Inquiry of the President of the Republic, KO103/14*, 1 July 2014. In that case the Court interpreted a different Article of the Constitution and interpreted the constitutional meaning of the term “political party or coalition that won the majority in the Assembly”. In this referral the Court is being asked to interpret the constitutional meaning of the term “largest parliamentary group”, which is a different constitutional term. Unlike parties and coalitions, parliamentary groups do not run in political elections but can be formed independent of elections by individual members of the Assembly. The practice of forming a parliamentary group frequently occurs after, not before, elections. Unlike the referral in KO103/14, where this Court was asked to interpret what the “largest political party or coalition” meant in Articles 95 and 84 of the Constitution, the Court is asked in this referral to interpret a specifically different term and a specifically different article of the Constitution relating to the selection of a specifically different official in the

government of Kosovo. If the drafters of the Constitution had intended that the term “largest parliamentary group” to mean the same as the term “political party or coalition” as used in Article 95 of the Constitution they could have used that same language in Article 67 of the Constitution. The fact that they did not clearly means that they intended a different meaning.

The fact that, unlike the previous Constitutional Framework, the drafters of Article 67 of the Constitution clearly provided that the candidate proposed to be President of the Assembly must also be elected by a majority vote of all deputies of the Assembly clearly demonstrates that they intended that the group in the Assembly that had the best chance of electing a person to be President, the largest parliamentary group, not the largest political party or coalition that may only consist of a minority of the members of the entire Assembly, would have the right and obligation to propose a candidate for President. Indeed, if the person proposed to be President of the Assembly cannot receive the votes of at least a majority of the members of the Assembly, the Assembly would be forced to exist without an essential officer for it to conduct its official business such as setting the agenda for the Assembly, convening and chairing sessions of the Assembly and signing acts adopted by the Assembly. See Article 67.7 of the Constitution. Under those circumstances it is quite likely that the Government could be dissolved pursuant to Article 82 of the Constitution simply by a successful vote of “no confidence.” Such a result could not have been intended by the drafters of Article 67 of the Constitution.

With respect to the facts of this referral it is undisputed that Mr. Agim Aliu was nominated by the largest political party in the Assembly of Kosovo to be President, but his election to that post failed because he never received the votes of the majority (61) of the members of the Assembly. Therefore, because Mr. Isa Mustafa was proposed by the largest parliamentary group in the Assembly, consisting of 47 members, to be elected President of the Assembly after another candidate was not elected by the Assembly, and because he was elected on 17 July 2014 by more than a majority of the members of the Assembly, the decision of the Assembly electing Mr. Mustafa as President of the Assembly complied with the Constitution.

Respectfully submitted,



Robert Carolan
Judge

