



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

Prishtina, 26 December 2012
Ref.No.: RK 335/12

RESOLUTION ON INADMISSIBILITY

In

Case no. KO148/11

Applicant

Ombudsperson of the Republic of Kosovo

Constitutional review of Article 11 paragraph 1, Article 32 paragraph 1 and 2, Article 34 paragraph 2 and Article 38 in conjunction with Articles 11, 32 and 34 of Law on Ombudsperson No.03/L-195 of 27 August 2010 and the request for interim measure

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, Judge

Applicant

1. The Applicant is the Ombudsperson of the Republic of Kosovo.

Challenged law

2. The Applicant has requested the annulment of the Article 11 paragraph 1, Article 32 paragraph 1 and 2, Article 34 paragraph 2 and Article 38 in conjunction with Articles 11, 32 and 34 of the Law on Ombudsperson No.03/L-195.

Subject matter

3. The subject matter of the Referral filed with the Constitutional Court is the assessment of the compatibility with the Constitution of Kosovo and the annulment of Article 11 paragraph 1, Article 32 paragraph 1 and 2, Article 34 paragraph 2 and Article 38 in conjunction with Articles 11, 32 and 34 of the Law on Ombudsperson No.03/L-195 of 27 August 2010 and the assessment of the request for interim measure regarding the suspension of the application of Article 32 paragraph 1 of the same Law.

Legal basis

4. Article 113.2 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Articles 20 and 27 Law.

Proceedings with the Court

5. On 16 November 2011, the Applicant filed the Referral with the Constitutional Court.
6. On 6 December 2011, the Ombudsperson filed with the Constitutional Court an additional request for the application of the interim measure. President of the Court appointed Judge Ivan Čukalović as a Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues, Snezhana Botusharova and Kadri Kryeziu .
7. On 27 March 2012, the Court notified the Institution of the Ombudsperson that their Referral was registered under no. KO 148/11 and it was being reviewed by the Court in accordance with the rules set forth in the Constitution, the Law on Constitutional Court and the Rules of Procedure of the Court.
8. On 13 June 2012, the Constitutional Court requested from the Assembly of Kosovo to submit comments, if it had any, on the Referral filed by the Ombudsperson, but no comments or response in this request had been received in the Court,
9. On 9 July 2012, the Constitutional Court requested additional information on the salary of the Ombudsperson and his deputies from the Ministry of Public Administration and from the Institution of the Ombudsperson.
10. On 13 July 2012, the Constitutional Court received a reply in writing from both - the Ministry of Public Administration and the Institution of the Ombudsperson – Department for Administration of Civil Service regarding the level of the salary of the Ombudsperson and his deputies.
11. On 5 December 2012, in the deliberation session on this Referral, the Review Panel unanimously proposed to the full Court the inadmissibility of the Referral.

Summary of facts

12. On 22 July 2010, the Assembly of the Republic of Kosovo (hereinafter: the Assembly) adopted the Law on Ombudsperson No. 03/L-195 which has been promulgated by the Decree of President of the Republic of Kosovo no. DL-046-2010, dated 09.08.2010.

13. Article 2 of this Law has stipulated that “This Law regulates the organization and functioning of the Ombudsperson Institution, establishing procedures for appointment and dismissal, powers and manner of work of the Institution of Ombudsperson and regulates the procedures for submitting the complaints and their investigation.”
14. On 7 October 2011 based on Decision no. 04.V-210 the Assembly of Kosovo elected the deputies of the Ombudsperson :1) Mr. Basri Berisha, 2) Mr. Isa Hasani, 3) Mr. Bogoljub Staletovic, 4) Mrs. Shqipe Ibraj-Mala and 5) Mr. Ibrahim Arslan.
15. Article 32,1 of this Law(Law on Ombudsperson No. 03/L-195) has stipulated that” The level of salary of the Ombudsperson and his deputies is determined in accordance with the Law for salaries of the public senior officials.”
16. Some of the legal solutions foreseen by the Law on Ombudsperson and in particular the one quoted above regarding the salary of the Ombudsperson and his deputies has caused dissatisfaction among the latter who have ascertained that this solution is less favorable than the one provided for by UNMIK Regulation 2006/6 on the Institution of the Ombudsperson of 16 February 2006.
17. UNMIK Regulation had determined the salary of the Ombudsperson and his Deputy (at that time there was only one Deputy) (Article 18 item 1 and 2), at the level of the salary of the President, respectively the Judge of the Supreme Court of Kosovo and pursuant to that Regulation MPA by Decision DASHC/MAP no. 114/LLL&RR.Z dated 7 July 2009, proceeded with the salary of the ombudsperson into the salary system based on coefficient 18 and with the coefficient 16.8 for his deputy ,equal to salaries of the president of the Supreme Court and Judges of the Supreme Court in that time.
18. This fixing of the level of salary had never changed until March 2012 when based on the recommendation of the Committee for Budget and Finance to the basic salary of the Ombudsperson was added 30 % of basic salary. The coefficient remained the same as determined by MPA in 2009.
19. The Institution of the Ombudsperson (IO) several times has raised the concern over the legal norm which determines the level of salary with the institutions of the Republic of Kosovo and in particular with the Assembly of Kosovo, Ministry of Public Administration (hereinafter: MPA) and with the Ministry of Economy as the most competent authorities requesting at the same time the resolution of this issue.
20. On 08.11.2011 the Institution of the Ombudsperson issued Decision no. 09/2011 on Fixing the Salaries of the Ombudsperson and his Deputies in the level same to the current level of salaries of the President and Judges of the Supreme Court of Kosovo.
21. Item three of this Decision provided that the payment would be made retroactively from 1 January 2011 for the Ombudsperson and from 7 October 2011 for his deputies.
22. The abovementioned decision was delivered to MPA to proceed with it into the salary system.
23. On 14 November 2011 - MPA by letter signed by Permanent Secretary and the Director of DACS/MPA (Department for Administration of Civil Service) refused to execute this decision with the reasoning that the level of salaries fixed in the Decision 09/2011 of IO was based on Article 18 of UNMIK Regulation 2006/6 on IO but this Regulation had been abrogated by the Law on Ombudsperson no. 03/L-195, adding that since the Law

on salaries of senior public officials was not approved yet, the level of salaries of these officials should be fixed by the Assembly of Kosovo.

24. As a result the Ombudsperson has continued to earn the salary fixed earlier based on UNMIK Regulation whereas two (2) of the deputies of the Ombudsperson which were elected by the Assembly have not received any salary until March 2012 and the other three (3) who had been employed with this Institution but in other positions have earned salaries for the positions they held earlier at the IO but not as deputies of the Ombudsperson.
25. On 28.03.2011 as it can be noticed from the minutes of the Committee for Budget and Finance, this Committee in item 4.3 of the agenda reviewed the request of IO and issued CONCLUSION supporting the request of the IO regarding the salary of the Ombudsperson and his deputies to be raised by 30 % over the basic salary.
26. On 13 July 2011, the Committee for Budget and Finance of the Assembly of Kosovo again reviewed a request by IO (item 3 according to the minutes) and it did not make a concrete decision except that it ascertained that another joint meeting should be held to resolve this problem.
27. On 16 November 2011 the Committee for Budget and Finance of the Assembly of Kosovo reviewed the request for proceeding with the decision on the salaries of the deputies of the Ombudsperson elected by the Assembly of Kosovo on 07.10.2011 (item 5 of the minutes) whereby a RECOMMENDATION was issued to address this request when reviewing the budget of IO for 2012.
28. On 24 February 2012, Ministry of Finance informed the IO that their recommendation was that the salaries of the Ombudsperson and his deputies should be at the level determined by UNMIK Regulation 2006/6 or at the current level until the adoption of the Law on the Salaries of Senior Public Officials.
29. On 8 March 2012, based on recommendation of Ministry of Finance, MPA has decided to continue proceeding with the current salary of the Ombudsperson pursuant to Regulation 2006/6 and pursuant to the decision of 2009, which means without harmonizing this salary with the current salary of the President and the Judges of the Supreme Court.
30. On 17 April 2012, the Committee for Budget and Finance has reviewed among other things the request of the IO on the level of salaries whereby the deputy Ombudsperson Mr. Basri Berisha has taken part in the meeting of this Committee and presented the stance of the IO on the issue of salaries. In that meeting the Committee did not take consideration the requests of IO but nevertheless it requested the execution of salaries (including the unpaid salaries for the two deputies) for the IO based on the Law on Budget of Kosovo for 2011 and 2012.
31. On 30 April 2012, the Presidency of the Assembly of Republic of Kosovo reviewing the recommendation of the Committee for Budget and Finance regarding the salaries of IO issued **Conclusion** that "the Government of Kosovo should execute the salaries for five deputies of the Ombudsperson at the level determined by the Law on Budget of Kosovo for 2011 and 2012.
32. In item two of the Conclusion it was requested from the Government to speed up proceeding with the Law on Salaries of Senior Public Officials.

33. Based on the replies received from IO and MPA, the Constitutional Court concludes that the current salary of the Ombudsperson is remained the same as was settled in 7 July 2009 by MPA , equivalent to the level of salary of the President of the Supreme Court (before the salaries of the judges of the all courts are increased) and the salary of the deputy of Ombudsperson equivalent with the level of salary of the judge of the Supreme Court(before the salaries of the judges of the all courts are increased))

Applicant's allegations on Constitutional violations

34. The Applicant considers *inter alia* that the Law on Ombudsperson No. 03/L-195 contains provisions which evidently infringe on its constitutional independence provided for in Articles 132 and 133 of the Constitution.
35. Ombudsperson also “notes that the legal wording of Article 32.1 of the Law which stipulates that: *The level of salary of the Ombudsperson and his deputies is determined in accordance with the Law on salary of public senior officials* and the wording of paragraph 2 of this Article which stipulates that *The level of salary of other staff of the Ombudsperson Institution determined in compliance with Law on salary of civil servants* leave the ombudsperson and his deputies **de jure** without salaries as they are based on a law which does not exist whereas **de facto** their salaries remain to be determined in an arbitrary manner without a legal basis as it has in fact happened later on.
36. Furthermore, the Ombudsperson emphasizes that in the final draft drawn up by the working group on the Law on Ombudsperson where the Ombudsperson himself took part it was stipulated that the salary of the Ombudsperson to be equal with the salary of the Judge of the highest court in Kosovo and the salary of the deputies of Ombudsperson will be at the level of 90% of the salary of Ombudsperson, whereas the salary of the other staff of IO to be equal with the salary of the staff of the Constitutional Court but upon the intervention from the Government's Legal Office these Articles have been reformulated and given the content they have in the existing law.
37. The Applicant further considers that Article 34 paragraph 2 of the Law which explicitly provides “Regardless of the provisions of other Laws, the Ombudsperson Institution prepares its annual budget proposal and sends it for approval to the Assembly of the Republic of Kosovo.” is a degradation of the solution proposed by the working group which has taken as a model the budget of the Constitutional Court and he considers that as a consequence the Government and other institutions may freely interfere with the financial institutions of the IO and for this he quotes paragraph 60 of the assessment of the draft law on ombudsperson made by Venice Commission which reads “*Although the Parliament can be considered as an authority that assures that the institution will receive the financial means to function in the right way, the Article 41 should determine that the allocated (dedicated) means are in accordance with the duties and responsibilities of the Ombudsperson and take into account the number of the filed complaints in the previous years.*”(Opinion no 434/2007 Strasbourg June 2007).
38. The Ombudsperson further makes an allegation on the unconstitutionality of Article 11 of the Law on Ombudsperson emphasizing that the definition of the immunity for the Ombudsperson and his deputies in the form provided by this law by excluding other officials of IO of immunity and by limiting the immunity only for the time they hold the office and not after its ending presents a violation of the integrity of IO because the law obliges the IO officials to keep the secret even after the end of the term of office while it

does not cover them with immunity for that time, which is in fact a legal obligation but without a legal protection.

39. Finally, according to the Ombudsperson Article 38 of this law which abrogates the provisions of UNMIK Regulations which had previously regulated the position of the Ombudsperson in fact has created an unconstitutional position for the Ombudsperson, his deputies and IO staff in relation to the salary, work offices and their immunity, and based on the facts presented in the Referral, the Ombudsperson requested from the Constitutional Court to annul these Articles of the law.

Preliminary assessment of the admissibility of Referral and the request for interim measure

40. Before it determines the formal criteria of admissibility of the Referral, the Court should answer two fundamental questions:

- a. Whether the Ombudsperson is an authorized party to refer a constitutional matter with the Constitutional Court; and
- b. Whether the raised matter before the Court is a constitutional matter.

41. In order to give the right answer to the abovementioned questions, the Court refers to Article 113.2 of the Constitution which explicitly provides:

2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

- (1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;*
- (2) the compatibility with the Constitution of municipal statutes.*

42. The Court also takes into consideration Article 135.4 of the Constitution which provides that:

“The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution.”

43. Based on the abovementioned constitutional definitions it is completely clear that the Ombudsperson is authorized to refer constitutional matters to the Constitutional Court with regard to the assessment of the compatibility of any Law approved by the Assembly of Kosovo with the Constitution.

44. The Law on Ombudsperson regardless of the fact that its main purpose is “to regulate the organization and functioning of the Institution of the Ombudsperson” (Article 2 of the Law) that is the organization and functioning of the Applicant itself, this law is still a law adopted by the Assembly and the Ombudsperson has the constitutional right to “*the question of the compatibility with the Constitution*” of this law like for every other law, it is therefore clear that the request of the Ombudsperson for the review of the compatibility of Article 11 paragraph 1, Article 32 paragraph 1 and 2, Article 34 paragraph 2 and Article 38 in conjunction with Articles 11, 32 and 34 of the Law on Ombudsperson No.03/L-195 of 27 August 2010 meets the legal requirement of Article 113.2 of the Constitution. Therefore, the Constitutional Court decides that the Ombudsperson is an authorized party and this is a constitutional matter and it presents a completely suitable ground for the Constitutional Court to conduct a constitutional review.

The fulfillment of the formal procedural criteria for the filing of the Referral And the request for interim measure

45. In order to have a proper Referral for review before the Constitutional Court, the Applicant has the obligation to fulfill the admissibility criteria laid down in the Constitution, the Law on Constitutional Court and the Rules of Procedure of the Court.
46. In this respect, the Constitutional Court refers to Article 113 .1[Jurisdiction and Authorized Parties] of the Constitution which stipulates: " *The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties*"
47. When reviewing Referrals regarding the compatibility of the laws with the Constitution, the Court in addition to assessing the legal capacity of "the authorized party" to file a Referral with the Court (locus standi), it also assesses the legal time limit within which an authorized party should file the Referral with the Constitutional Court.
48. In this respect, the Court refers to Article 29 (Accuracy of Referral) which stipulates the competence for filing a Referral under Article 113.2 of the Constitution based on which this Referral has been filed by the Ombudsperson and Article 30 (Deadlines) of the Law on the Constitutional Court of the Republic of Kosovo (Law No. 03/L-121) which expressly provides "A referral made pursuant to Article 29 of this Law shall be filed within a period of six (6) months from the day upon which the contested act enters into force."
49. The purpose of the six-month rule is to promote security of the law and legal certainty ,to ensure that cases raising Constitutional issues are dealt with within a reasonable time and to protect the authorities and other persons concerned from being under uncertainty for a prolonged period of time (see among many other authorities, *P.M. v. the United Kingdom* (dec), no 6638/03, decision of 24 August 2004.
50. After reviewing the Referral of the Ombudsperson for assessing the compatibility of the Law on Ombudsperson, the Court finds that this Referral has been filed with the Court on **16 November 2011 and the additional request for imposing an interim measure on 6 December 2011, whereas the Law on Ombudsperson has entered into force and published in the Official Gazette of Kosovo no. 80 on 27 August 2010.**
51. Based on these facts it results that the Referral of the Ombudsperson regarding the assessment of the compatibility of some Articles of the Law on Ombudsperson with the Constitution of Kosovo and the request for imposing an interim measure are **out of time** as they have been filed after the expiry of deadline of 6 months "from the day upon which the contested act enters into force" prescribed in Article 30 of the Law on the Constitutional Court of the Republic of Kosovo (**Law No. 03/L-121**), therefore the Referral should be declared inadmissible.
52. Based on the foregoing, the Court considers that the Applicant has not fulfilled the admissibility criteria which are also set forth by Rule 36 of the Rules of Procedure of the Constitutional Court and consequently there is no ground for the assessment of the Referral on the merits , therefore:

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution of the Republic of Kosovo, Article 20 in conjunction with article 30 of the Law on the Constitutional Court and Rule 36 of the Rules of Procedure, in its session held on 5 of December 2012, unanimously

DECIDES

- I. TO REJECT the Referral as inadmissible;
- II. TO REJECT request for interim measure
- III. 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 on the Constitutional Court; and
- IV. This Decision is effective immediately.

Judge rapporteur

Ivan Čukalović

President of the court



Prof. Dr. Enver Hasani

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution of the Republic of Kosovo, Article 20 in conjunction with article 30 of the Law on the Constitutional Court and Rule 36 of the Rules of Procedure, in its session held on 5 of December 2012, unanimously

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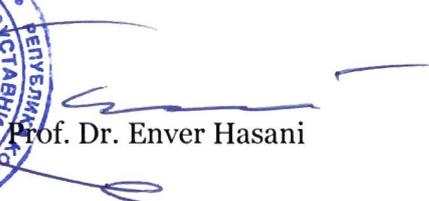
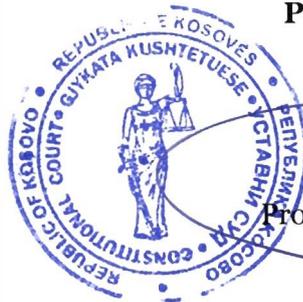
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- IV. This Decision is effective immediately.

Judge rapporteur



Ivan Čukalović

President of the court



Prof. Dr. Enver Hasani