



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Pristina, 16 December 2010
Ref. No.: RK73/10

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 04/10

Applicants

Xhafer Maliqi and others

vs.

Kosovo Bar Association

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicants

1. The Applicants are Xhafer Maliqi, Bajram Maraj, Betim Shala, Feriz Gërvalla, Jonuz Rama, Iliriana Osmani Serreqi, Ramë Dreshaj, Mexhid Sylja, Fazli Balaj, Arianit Koci and Burim Xhemajli of whom Bajram Maraj, Betim Shala, Feriz Gërvalla, Ramë Dreshaj, Bajram Tmava, Mexhid Sylja, Fazli Balaj and Burim Xhemajli are represented by Xhafer Maliqi, who is also a practicing lawyer in Pristina.

Respondent Party

2. The Respondent party is the Kosovo Bar Association (hereinafter: the "KBA").

Subject Matter

3. The Applicants claim that the members of the Assembly of the KBA, in the composition as convened on 19 September 2009, took decisions that were not in accordance with the applicable Law on the Bar and in violation of Article 45 [Freedom of Election and Participation] of the Constitution.

Legal Basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 22 of Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Section 54(b) 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 20 January 2010, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court"), together with a power of attorney, duly signed by the other Applicants, dated 22.01.2010.
6. On 24 March 2010, the Referral was communicated to the President of KBA, which, so far, has not submitted any comments.
7. On 15 December 2010, the Review Panel, consisting of Judge Almiro Rodrigues (Presiding), and Deputy President Kadri Kryeziu and Judge Gjyljeta Mushkolaj, considered the Report of the Judge Rapporteur Robert Carolan and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

8. Pursuant to Article 3.3 of Law No. 03/L-117, promulgated on 12 February 2009 (hereinafter: the new Law), the independence of the Bar is achieved through the organisation of lawyers through the Kosovo Chamber of Advocates, as an independent public organisation.
9. Pursuant to Article 22 of the new Law, the KBA Assembly is composed of all KBA Members, instead of the 78 members as provided by the previous law.
10. On 19 September 2009, the Assembly of KBA, in its composition under the previous law, was convened by its current President: for the approval of the KBA Statute and other KBA regulations; as well as for the election of the KBA President, the Deputy, and members of the KBA Board

11. An Assembly member apparently suggested that the Assembly meeting with the proposed agenda should not be held, since it would not be able to take lawful decisions, if the composition was in compliance with the new Law. His proposal was put to the vote of the Assembly and rejected.
12. Consequently, all decisions were taken by a majority of the members, present and voting, under the previous law.

Applicants' allegations

13. The Applicant alleges that, on 19 September 2009, the Assembly of the KBA was convened, approved the new statute of the KBA and other regulations, elected its President and other new bodies in accordance with the provisions of the old law (Law on the Bar and other Legal Assistance, Official Gazette of KSAK, No: 011-69/79) and not under the new Law (No. 03/L-117) on the Bar which was already in force on that date.
14. The Applicants, therefore, complain that the Assembly of KBA, was convened on 19 September 2009 in violation of the new Law on the Bar.
15. Hence, the KBA could not have adopted the decisions on 19 September 2009 in the way it had been done, because, according to Article 22 (2) of the new Law on the Bar, the Assembly should have been composed of all members of the Bar, i.e. all 500 registered members. However, only 78 of them (constituting the number of Assembly members under the previous law) had been convened, out of whom 55 were present. This means that the other registered members were victims of a violation of their right to take part in the meeting; to approve regulations; and to elect the President of the Bar and other bodies, in compliance with the applicable Law.
16. In sum, the Applicants claim that the members of the Assembly of the KBA, in the composition as convened on 19 September 2009, took the following decisions:
 - a. Decision on the Approval of the Statute of the Kosovo Bar Association and other acts of the Bar Association.
 - b. Decision on the election of the President and Vice President of the Kosovo Bar Association.
 - c. Decision on the election of the Board of the Kosovo Bar Association

In their opinion, these decisions were not taken in accordance with the applicable Law on the Bar, but taken in violation of Article 45 [Freedom of Election and Participation] of the Constitution.

Assessment of the admissibility of the Referral

17. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

18. In this respect, Article 113.7 of the Constitution provides :

“Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”

19. In this respect, the Court wishes to emphasize that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. (*see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999*). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (*see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004*).

20. This Court applied this same reasoning when it issued a Resolution on 27 January 2010 on inadmissibility on the grounds of non exhaustion of remedies in the case of AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Case No. KI. 41 /09 and in the Resolution of 23 March 2010 in the case of Mimoza Kusari-Lila vs. The Central Election Commission, Case No. KI 73/09.

21. This Court has not in this Referral addressed whether the statute of KBA violates the Constitution because that question was never asked in the Referral of the Applicants. The Court notes that this question should be raised, if raised at all, before the regular courts.

22. As to the present Referral, the Court notes that the applicable law at the time of the events, which are at the basis of the Applicants' complaint, was Law No. 03/L-117 on the Bar, promulgated on 12 February 2009. In its Article 28 [Supervision and cooperation with other bodies], the Law stipulates that:

“1. The Government of Kosovo monitors the lawfulness of the acts of the General Chamber of Advocates and is authorized to suspend the application of an act conflicting with the Law, pending the Supreme Court taking a decision on it. This monitoring is limited to the adherence to the law and legislation and must not undermine the autonomy of the Chamber of Advocates.”

23. From the Applicants' submissions, however, it appears that they did not follow the procedure laid down in Article 28(1) of the Law on the Bar. The Court, therefore, concludes that the Applicants have not exhausted all legal remedies available to them under applicable law. It follows that the Referral must be rejected, pursuant to Article 113.7 of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, 47 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously,

DECIDES

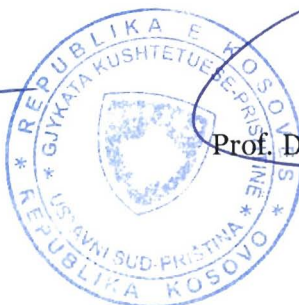
- I. **TO REJECT** the Referral as Inadmissible.
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.
- III. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court



Robert Carolan



Prof. Dr. Enver Hasani