



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

Prishtina, on 20 November 2017
Ref. no.: RK1152/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KIo5/17

Applicant

Osman Sylanaj

**Constitutional Review of Article 11 of Law No. 05/L-068 on amending
and supplementing Law 04/L-042 on Public Procurement of the
Republic of Kosovo, amended and supplemented by Law No. 04/L-237**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Applicant is Osman Sylanaj from Skenderaj (hereinafter: the Applicant), employed at the Kosovo Institute for Public Administration (hereinafter: KIPA).

Challenged law

2. The Applicant challenges the constitutionality of Article 11 of Law No. 05/L-068 on Amending and Supplementing Law No. 04/L-042 on Public Procurement of the Republic of Kosovo, amended and supplemented by Law No. 04/L-237, concretely in the part of the law t related to the competences of the Public Procurement Regulatory Commission (PPRC).

Subject matter

3. The subject matter is the constitutional review of the challenged law which, according to the Applicant's allegations, is in collision with Articles 2 and 5 of the Law on KIPA (Law No. 04/L-221 adopted by the Assembly of Kosovo on 20 March 2014) and in violation of Article 112.1 [General Principles] Article 79 [Legislative Initiative] and Article 16 [Supremacy of the Constitution] of the Constitution of the Republic of Kosovo

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 20 January 2017, the Applicant submitted through the mail service the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 27 February 2017, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Ivan Čukalović.
7. On 3 March 2017, the Court notified the Applicant about the registration of the Referral.
8. On 3 July 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 31 August 2011, the Assembly of Kosovo adopted the Law on Public Procurement in the Republic of Kosovo (04/L-042) which was published in the Official Gazette of the Republic of Kosovo on 19 September 2011 and entered into force 15 days after its publication.
10. The Law, in relevant provisions related to this case, has the following content:

Article 25

Training of Procurement Officers

- 1. KIPA in cooperation with PPRC is responsible to develop training modules and curriculum for procurement qualifications. KIPA and PPRC is required to identify, experienced in public procurement, suitable to teach the procurement courses designed by PPRC. KIPA shall arrange for the development and delivery, of a procurement training courses having duration of at least fifteen (15) days. PPRC in cooperation with KIPA ensures that such courses are developed and delivered by a trained person or training organizations having substantial expertise in best international procurement practices and the procurement system of the EU.*
- 2. KIPA shall be responsible for organizing examinations.*
- 3. Any interested person may attend a procurement professional training course. Contracting authority shall in relation to employed Procurement Officers treat such training time as time spent at work and shall compensate its Procurement Officer for such time in the same manner as that applicable to time spent at work. The contracting authority may also provide such person, in accordance with the applicable normative and sub-normative acts, reimbursement for expenses that such person necessarily incurs in order to attend such training.*
- 4. KIPA shall issue a "basic procurement professional certificate" only to persons who have satisfactorily completed all of the basic courses and who are recommended by the trainer. KIPA shall issue an "advanced procurement professional certificate" only to persons who have satisfactorily completed all of the advanced courses.*

[...]

11. On 14 January 2015, the Assembly of Kosovo adopted Law No. 05/L-068 on Amending and Supplementing the Law 04/L-042 on Public Procurement of the Republic of Kosovo, amended and supplemented by Law No. 04/L-237. The Law was published in the Official Gazette of Kosovo on 6 January 2015 and entered into force 15 days after its promulgation.
12. The Law in Article 11, which is challenged by the Applicant and which has amended the content of Article 25 of the previous Law, has the following content:

Article 11

1. Article 25 of the basic Law, paragraphs 1, 2, 4, 5, 6, 7, 8, 9 shall be reworded with the following text:

1. PPRC is responsible to develop training modules and curriculum for procurement qualifications. PPRC is required to identify persons, experienced in public procurement, suitable to teach the procurement courses designed by PPRC. PPRC, in cooperation with KIPA, shall arrange for the development and delivery, of procurement training courses having

duration of at least fifteen (15) days for basic training and ten (10) days for advanced training. PPRC ensures that such courses are developed and delivered by a trained person or training organizations having substantial expertise in best international procurement practices and the procurement system of the EU.

2. PPRC, in cooperation with KIPA, shall be responsible for organizing examinations.

4. PPRC, in cooperation with KIPA, shall issue a “basic procurement professional certificate” only to persons who have satisfactorily completed all of the basic courses and who are recommended by the trainer. PPRC, in cooperation with KIPA, shall issue an “advanced procurement professional certificate” only to persons who have satisfactorily completed all of the advanced courses.

[...]

Applicant’s allegations

13. The Applicant alleges that the challenged provision of the law in question acquires the competencies previously established in the basic law on public procurement (Article 25, Law No. 04/L-042) and the Law on KIPA where professional training in the field of procurement was the competence of KIPA and now are within the PPRC.
14. This change of law, according to the Applicant, is in direct collision with the Law on KIPA (Articles 2 and 5) and the Law on Civil Service, whereas it is directly contrary to Articles 16, 79 and 112 of the Constitution.

Admissibility of the Referral

15. In order to be able to adjudicate the Applicant’s Referral, the Court first examines whether the Applicant has met the admissibility requirements laid down in the Constitution, and, as further specified in the Law and the Rules of Procedure.
16. In this respect, the Court refers to Article 113.7 of the Constitution which establishes:

“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.”

17. The Court further refers to Article 48 of the Law, which stipulates:

“In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.”

18. The Court also refers to Rule 36 of the Rules of Procedure which specifies:

“The Court may consider a referral if:

(a) the referral is filed by an authorized party, or [...].”

19. In assessing the Referral and the admissibility requirements, and in particular the requirement of the authorized party to submit a referral for review, the Court finds that the Constitution of the Republic of Kosovo in its Article 113 [Jurisdiction and Authorized Parties] expressly provides:

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

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.

8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue.

20. Based on the above, it is clear that the Constitution of Kosovo does not foresee the possibility for an individual to challenge the compliance of a law approved by the Assembly of Kosovo but this competence is foreseen for the authorized parties, the President of the Republic of Kosovo, the Government and the Ombudsperson in accordance with Article 113.2, and for the regular courts with Article 113.8.
21. Apart from this, the Constitution of the Republic of Kosovo does not provide for *actio popularis* which is a modality of individual appeals enabling each individual who attempts to protect public interest and constitutional order to address the Constitutional Court with certain questions and requests, indicating a violation of the constitutional rights (See Resolution on Inadmissibility, Case KI157/11 of the Applicant Azem Ejupi “Request for regulation of status of pensioners and of labor disabled persons and improvement of welfare of pensioners of the Republic of Kosovo by state authorities” of 25 February 2013).
22. In the circumstances when a Referral is filed by an unauthorized party, the Court cannot assess the merits of the case and accordingly, in the present case, the Court does not assess the Applicant's allegations as to whether or not the challenged provisions are compatible with the Constitution, or the other allegation related to possible collision of laws.

23. In these circumstances, the Court finds that the Applicant has not fulfilled the requirement of the authorized party under Article 113.1 of the Constitution and Rule 36 (1) (a) of the Rules of Procedure, therefore, the Referral is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution, Article 48 of the Law and Rules 36 (1) (a) of the Rules of Procedure, on 3 July 2017, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20. 4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

Selvete Gërxhaliu-Krasniqi

President of the Constitutional Court

Arta Rama-Hajrizi

