



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

Pristina, 16 December 2010
Ref. No.: RK74 /10

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 07/10

Applicant

Municipality of Klina

**Constitutional Review of Decision of the Independent Oversight Board of
Kosovo, No. 112/08, dated 5 June 2009**

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

Applicant

1. The Applicant is the Municipality of Klina, represented by Xhavit Dauti, a practicing lawyer from Klina.

Challenged decision

2. The Applicant challenges the Decision of the Oversight Board of Kosovo (hereinafter: IOBK) No. 112/08 of 5 June 2009, which was served on the Applicant on 16 June 2009.

Subject matter

3. The Applicant challenges the decision of the IOBK pursuant to Article 113.4 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

Legal basis

4. Articles 113.4 of the Constitution, Article 22 of Law No. 03/L-121 on the 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").GHa

Proceedings before the Court

5. On 27 January 2010, the Applicant filed a referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").
6. On 24 March 2010, the Referral was communicated to the IOBK, which replied on 13 July 2010, stating that it had taken its decision based on Article 11.1 of UNMIK Regulation 2008/12 on amending UNMIK Regulation 2001/36 on the Kosovo Civil Service, which authorizes the IOBK to review complaints submitted by civil servants and that the Referral of the Applicant was unfounded.
7. On 13 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 Iliriana Islami and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

8. On 31 January 2008, the Acting Director of the Department of Administration and Personnel of Klina Municipality, through Notification No. 02-118-481/08, dated 31 January 2008, informed the Head of the Inspectorate Section in the Department of Urban Planning and Public Services (hereinafter: "HIS") of the termination of his contract of employment as of 29 February 2008. The given reason was that, due to the reorganization of the municipal executive, pursuant to UNMIK Regulation No. 2007/30 on Self-Government of Municipalities in Kosovo, the post, which he had occupied since 1 July 2005, had to be suppressed despite his contract of employment having been extended from 2 July 2007 to 30 June 2010.
9. On 26 February 2008, pursuant to Article 35 of Administrative Direction No. 2003/02, implementing UNMIK Regulation No. 2001/36 on the Kosovo Civil Service, the Acting Director of the Department of Administration and Personnel

of Klina Municipality, confirmed the decision on the termination of the HIS' employment contract.

10. Unsatisfied with the decision, the HIS submitted an appeal (Appeal No. 01-118-865/08 of 5 March 2008) with the Municipal Appeals Board.
11. On 8 April 2008, the Appeals Board rejected the appeal as unfounded, stating that Klina Municipality decided to re-organize the municipal departments on 14 January 2008, one of them being the Municipal Inspection Department and to suppress the post of Head of the Inspectorate Section.
12. On 5 June 2009, the IOBK, to which the HIS had appealed, granted the appeal, annulling the decision of the Appeals Board.
13. Moreover, the IOBK instructed Klina Municipality to honor all rights of HIS under his contract of employment and, if unable to do so, to act in accordance with Article 11.1 of Administrative Direction 2003/2 Implementing Regulation 2001/36 on the Kosovo Civil, stipulating that, in case of an arbitrary dismissal, civil servants, have to be reassigned to a new post which is in line with their qualifications and competence.
14. The IOBK also requested Klina Municipality to be notified of the measures it would take in accordance with the Board's decision and indicated that, if its decision would not be implemented, it would undertake the measures set forth in Article 11.4 of Regulation 2008/12 Amending Regulation 2001/36 on the Kosovo Civil Service (forwarding the decision of IOBK to the Prime-minister of Kosovo).

Applicant's allegations

15. The Applicant claims, that Decision No. 112/08 of 5 June 2009 of the IOBK has violated the Constitution, because it is not in conformity with the provisions of UNMIK Regulation 2001/36 on the Kosovo Civil Service and Article 35 of the Administrative Direction Implementing this Regulation, as well as Step 5 of the Administrative Instruction No. 2003/02 Implementing Regulation No. 2001/36 on the Kosovo Civil Service.
16. The Applicant further alleges that the IOBK, pursuant to Article 11, paragraph 11.1 of Regulation No. 2008/12 Amending UNMIK Regulation No. 2001/36 on the Kosovo Civil Service and Article 35 of Administrative Direction No. 2003/02 Implementing Regulation No. 2001/36 on the Kosovo Civil Service, may only review appeals from civil servants, but it is not authorized to reinstate a civil servant in his previous position.

Assessment of the admissibility of the Referral

17. In order for the referral to be admissible, it has first to be assessed whether the Applicant has fulfilled all admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure of the Court.
18. The Court notes that the Applicant submitted the Referral under Article 113.4 of the Constitution, which provides:

“A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.”

19. Article 101.2 of the Constitution provides that the IMK is an independent board.
20. According to UNMIK Regulation No. 2008/12 Amending Regulation No. 2001/36, dated 27 February 2008, article 7.1 provides:

“An Independent Oversight Board for Kosovo (hereinafter “the Board”) is hereby established.”
21. With Article 7.2 of UNMIK Regulation No. 2008/12 Amending Regulation No. 2001/36, dated 27 February 2008 it is provided that:

“The Board shall be an autonomous body reporting directly to the Assembly of Kosovo. The Assembly of Kosovo shall forward all reports of the Board to the Prime Minister. All reports of the Board shall be public documents.”
22. The fact that IMK is an independent board is also provided by Article 8.1 of this UNMIK Regulation which states that: *“The Board shall be composed of seven (7) members who shall be appointed by the Assembly of Kosovo according to open and transparent procedures.”*, meaning that the members of the Board are not even proposed by the Government.
23. Further, IMK in respect to assessing the compliance with the governing principles of civil service in accordance with Article 13 of the above referred Regulation has conducted monitoring in the office of the Prime Minister, the Presidency, the Administration of the Assembly and this fact proves the independence of the IMK and proves the fact that the decisions of the IMK are not acts of the government but are acts of an independent body (see the Annual Work Report of IMK).
24. Further, the Law No. 03/L-192 on IMK, the scope of IMK is determined by law.
25. Therefore, the Applicant's allegation that a violation has occurred under Article 113.4, in the instant case, is incompatible with the Constitution because the competences of the Municipality under abovementioned article in order to submit a Referral to this Court are limited to the following: the laws or acts of the government infringing upon the responsibilities or diminishing the revenues of the municipality that otherwise is provided by Law on Local Self-Government and the European Charter on Local Self-Government. The Court in this case emphasizes that the decision of IOBK in this case does not violate these responsibilities because they are within the scope of the competences of this independent body guaranteed by the Constitution and laws, and are part of the authorized responsibilities within Constitutional limits of local self government. Given the facts it is clear that the Referral of the municipality in its content is incompatible with the Constitution under the principle *ratione materiae*.
26. Furthermore, Article 11.6 of UNMIK Regulation No. 2008/12 Amending UNMIK Regulation No. 2001/36 on the Kosovo Civil Service provides that:

“A Board decision constitutes a final administrative decision subject to judicial review in accordance with the applicable law.”

27. Based on the submitted documents, the Applicant has not submitted any evidence that he has appealed the decision in accordance with the Legal advise. In accordance with Article 31 (5) of the Law on Regular Courts, Official Gazette of the Socialist Autonomous Province of Kosovo No. 21/1978 (Law on Regular Courts) final administrative decisions are reviewed by the Supreme Court in an administrative conflict procedure.

28. Even if we assume that the Applicant has had real competence to submit this Referral, the Court deems that in compliance with Article 113.7 in conjunction with Article 21.4 of the Constitution, which provide:

“113.7 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.”

“21.4 Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.”

The Applicant has not submitted any evidence that he has not exhausted all legal remedies under applicable law.

29. 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. This is an important aspect of the subsidiary character of the Constitution. (see: Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, of 27 January 2010 and, *mutatis mutandis*, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999).

30. For these reasons, the Referral is Inadmissible.

FOR THIS REASON

The Constitutional Court, pursuant to Article 113.4 of the Constitution, Article 20 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


Dr. Iliriana Islami

President of the Constitutional Court


Prof. Dr. Enver Hasani

