



REPUBLIKA E KOSOVES - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

PRISHTINA, 03 MARCH 2011
REF. NO.: AGJ/85/11.

JUDGMENT

in

Case No. KI 32/10

**Fahrudin Megjedovic, Deputy Chairperson for Communities of the
Municipal Assembly in Peja**

vs.

**Decision of the Municipal Assembly of Peja on the appointment of the Deputy
Mayor of Municipality for Communities, dated 15 February 2010**

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 Cukalovic, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is Mr Fahrudin Megjedovic, Deputy Chairperson for Communities of the Municipal Assembly of Peja.

The Challenged Decision

2. The Applicant challenges the Decision of the Municipal Assembly of Peja on the appointment of the Deputy Mayor for Communities made on 15 February 2010.

Subject Matter

3. The subject matter of the referral filed to the Constitutional Court of the Republic of Kosovo (hereinafter: "the Court"), dated 17.05.2010, is the Assessment of Constitutionality of the Decision of the Municipal Assembly of Peja on the appointment of the Deputy Mayor of Municipality for Communities, dated 15 February 2010.

Legal Basis

4. The Applicant's Referral is based on Article 62.4 of the Constitution of the Republic of Kosovo (hereinafter: "the Constitution"), Article 55.4 of the Law No.03/LO40 on the Local Self-Government of the Assembly of Republic of Kosovo (hereinafter: "the Law"), and Section 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: "Rules of Procedure").

Proceedings before the Court

5. On 17 May 2010 the Deputy Chairperson for Communities of the Municipal Assembly in Peja (hereinafter: MA Peja) filed a Referral with the Court requesting the assessment of the constitutionality of the Decision of the Municipal Assembly made on 15 February 2010 in relation to the election of the Deputy Mayor for Communities for the Municipality of Peja.
6. On 02 July 2010, the President of the Court, pursuant to the Rules of Procedures, appointed Judge Kadri Kryeziu to be Judge Rapporteur, and appointed a Review Panel composed of Judge Robert Carolan (presiding), Judges Altay Suroy and Snezhana Botusharova.
7. On 05 July 2010, the Secretariat of the Court notified the Municipality of Peja of the Referral and requested its response. The Court notes, with regret, that the Municipality of Peja did not provide any response to that request.
8. The Review Panel considered the Report of the Judge Rapporteur and recommended to the Court the admissibility of the referral. The full Court deliberated on the referral in private session.

Summary of the facts

9. On 15 January 2010, the Municipal Assembly of Peja held its inaugural session following the Local Elections held on 15 November 2009. Item 6 on the agenda was the proposal for the appointment of the Deputy Mayor for Communities.
10. The minutes disclose that "On the proposal by Mayor Dr. Ali Berisha, pursuant to the legal provisions in force and consultations at the highest institutional level, the appointees for Deputy Mayor and Deputy Mayor for Communities" were:
 1. Mr Gazmend Muhaxheri, Deputy Mayor;
 2. Mr Ibish Bajrami, Deputy Mayor for Communities; and
 3. Mr Drenko Todorovic, Deputy Mayor for the Serb community.
11. Mr Fahrudin Megjedovic, who is a municipal assembly member from the Bosniak community and also the Deputy Chairperson of the Municipal Assembly for Communities in Peja, contested the appointment as he considered the Decision unlawful. His reaction was made publicised in the print and broadcast media.

12. At the next session of the Municipal Assembly, held on 15 February 2010, item 7 (seven) of the agenda was a repeat of the vote for the position of Deputy Mayor for Communities even though Mr Ibish Bajrami was recorded as having been already been appointed to that position on 15 January 2010. At this session, the Mayor of the Municipality again proposed Mr Ibish Bajrami for the position of Deputy Mayor for Communities.
13. The proposal presented by the Mayor was put to a vote by the Chairperson of the Assembly, and out of 40 municipal assembly members present, 38 voted in favour and 2 voted against the proposal. The vote of the assembly members from Communities was split in two: two were in favour and two were against the proposal of the mayor. In the events that happened the Assembly Chairperson then purported to cast a deciding vote in favour of Mr Ibish Bajrami and announced him duly elected.
14. On 19 February 2010, the Applicant, in his capacity as Deputy Chairperson of the Municipal Assembly for Communities filed a complaint with the Ministry of Local Government Administration (hereinafter: "MLGA"), outlining the procedure followed for the election of Mr Ibish Bajrami for the position of the Deputy Mayor for Communities in the Municipality of Peja. He requested the MLGA to render a decision annulling the decision of the MA Peja, dated 15 February 2010, and to compel the MA Peja to repeat the voting process for the election of the Deputy Mayor for Communities. In the events that happened the MLGA did not annul the decision of the MA Peja.
15. On 13 April 2011, the Applicant filed a request with the Mayor, where he requested that at the next meeting of the Committee for Policies and Finance, and at the next session of the Municipal Assembly, the agenda should again include the issue of the election of Deputy Mayor for Communities.
16. The matter was not included in the Agenda for the next meeting of the Municipal Assembly
17. In a letter dated 21 February 2010 the MGLA informed the Municipality of Peja that, in compliance with the report from its observers present in the session of 15 February 2010 of the MA Peja, it had reached the conclusion that the election of the Deputy Mayor for Communities was conducted not in contradiction with Article 61.3 of the Law on Local Self-Government. The MGLA ordered the MA Peja to review the decision in question within the deadline provided by Article 82.2 of the Law on Local Self-Government.
18. On 11 March 2010 the Municipality of Peja provided its response in writing to the MLGA, where it stressed that the Decision of the Municipal Assembly for the election of the Deputy Mayor for Communities, dated 15 February 2010, was legal and regular, and thus the MA Peja does not consider that there is a reason to suspend the decision or review it.

Applicant's allegations

19. The Applicant alleges that the Decision of the Municipal Assembly in Peja violated the constitutional rights for an effective legal remedy and the right to be elected. According to the applicant, the election of the Deputy Mayor for Communities by the Municipal Assembly was done in violation of Article 61.3 of the Law No.03/L-040 on Local Self-Government, adopted by the Assembly of the Republic of Kosovo. The Applicant requests the assessment of the constitutionality and legality of the decision in question.
20. In essence the Applicant maintains that the Chairperson had no right to give a casting vote to Mr Bajrami when the members of the Assembly representing the members of Communities split equally in favour and against the proposal. Consequently, the

Applicant maintains that Mr Bajrami's appointment was unlawful and in breach of the Constitutional rights of the members of Communities.

Assessment of the admissibility of the Referral

21. Article 82 of the Law on Local Self Government deals with procedures for the review of the legality of acts by Municipalities in Kosovo. It provides a discretion to the Minister for Local Government to refer questions of the legality or constitutionality of acts or decision of the Municipality to the District Court. The Article provides as follows:

Article 82 The Procedure for the Review of Legality

82.1. If the supervisory authority considers a decision or other act of a municipality to be inconsistent with the Constitution and laws, it may request that the municipality reexamine such decision or act. The request shall state the grounds of the alleged violation of the Constitution or law and shall not suspend the execution of the municipal decision or other act at issue.

82.2. The municipal body shall respond to request for re-examination within 30 days of notification of receipt of such request.

82.3. If the municipal body accepts the request for re-examination, it may suspend the execution of the contested decision or act pending the deliberation by the municipal authorities.

82.4. If the municipal body fails to respond within the deadline or rejects the request or upholds the contested decision or act, the supervisory authority may challenge the act in question in the District Court competent for the territory of the municipality within 30 days following the failure to respond, notification of the rejection or the upholding of the contested decision or act.

82.5. The District Court may order, by interim measure the suspension of the application of the contested decision or act or other temporary acts in accordance with the applicable law.

22. This power of referral of the matter to the District is discretionary only. It was not exercised by the relevant Minister. Because the Minister did not exercise his discretion no other avenue of appeal against the decision of MA Peja of 15 February was available other than to refer the matter to the Constitutional Court.
23. Pursuant to Article 113 (1) of the Constitution the Constitutional Court decides only on matters referred to the court in a legal manner by authorised parties. Mr Megjedovic brings this Referral as Deputy Chairperson for Communities of a Municipality, being a person authorised to refer acts or decisions of the Municipality that are alleged to be in violation of their rights to the Constitutional Court.
24. In this respect, the Court refers to the provisions of Article 62.3 and 62.4 of the Constitution in relation to representation in the institutions of Local Government which provide as follows:

Article 62.3

The Vice President for Communities shall promote inter-Community dialogue and serve as formal focal point for addressing non-majority Communities' concerns and interests in meetings of the Assembly and its work. The Vice President shall also be responsible for reviewing claims by Communities or their members that the acts or decisions of the Municipal Assembly violate their constitutionally guaranteed rights. The Vice President shall refer such matters to the Municipal Assembly for its reconsideration of the act or decision.

Article 62.4

In the event the Municipal Assembly chooses not to reconsider its act or decision, or the Vice President deems the result, upon reconsideration, to still present a violation of a constitutionally guaranteed right, the Vice President may submit the matter directly to the Constitutional Court, which may decide whether or not to accept the matter for review.

25. The Referral alleges a breach of constitutionally guaranteed rights and it brought by an authorised person. The Court is satisfied that the Applicant has the proper legal standing and authority to bring this referral to the Constitutional Court and that the Referral is therefore admissible.

Merits

26. It is recalled that the Applicant challenges the Decision of the Municipal Assembly of Peja on the appointment of the Deputy Mayor for Communities made on 15 February 2010. From the facts submitted it is clear that the Applicant's complaint relates to the special rights and protection that is given to persons belonging to the non-majority communities in the Republic of Kosovo. Such special position of non-majority communities is reflected in particular in guaranteed representation, in certain circumstances, in Municipalities and in the Assembly of Kosovo.
27. This status arises originally in law from the terms of the Comprehensive Proposal for the Kosovo Status Settlement, dated 26 March 2006, commonly referred to the Ahtisaari plan. Indeed, one area that receives particular attention is that dealing with the rights of communities and its members as provided for in Article 3 of the Comprehensive Proposal, which provides:

Article 3 Rights of Communities and Their Members

3.1 Inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of Kosovo (hereinafter referred to as Communities) shall have specific rights as set forth in Annex II of this Settlement, in addition to the human rights and fundamental freedoms provided for in Article 2 of Annex I of this Settlement.

3.2 Kosovo shall guarantee the protection of the national or ethnic, cultural, linguistic and religious identity of all Communities and their members. Kosovo shall also establish the constitutional, legal and institutional mechanisms necessary for the promotion and protection of the rights of all members of Communities and for their representation and effective participation in political and decision-making processes, as set forth in Annexes I and II of this Settlement.

28. The Annexes referred to in Article 3 of the Comprehensive Proposal deal with substantive protection given to Communities and their members.
29. The Constitution also has a special Chapter dealing with the Rights of Communities and their members. Chapter III of the Constitutions from Article 57 to 62 substantially reflect and also augment the obligations and the rights contained in the Comprehensive Proposal. Article 57 dealing with the General Principles of the Rights of Communities provides as follows:

Article 57 [General Principles]

1. *Inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo (Communities) shall have specific rights as set forth in this Constitution in addition to the human rights and fundamental freedoms provided in Chapter II of this Constitution.*

2. *Every member of a community shall have the right to freely choose to be treated or not to be treated as such and no discrimination shall result from this choice or from the exercise of the rights that are connected to that choice.*

3. *Members of Communities shall have the right to freely express, foster and develop their identity and community attributes.*

4. *The exercise of these rights shall carry with it duties and responsibilities to act in accordance with the law of the Republic of Kosovo and shall not violate the rights of others.*

30. This Court drew attention to the constitutional and statutory protections given to Communities in its Judgment in the case of Cemal Kurtesi vs. The Municipality of Prizren, KO 01-09, dated 18 March 2010. This Court refers to that Judgment now and to the setting out of the nature of the institutions of Local Self Government and their obligations in relation to the right of Communities and their members, (see, *inter alia*, paragraphs 17, 30, 31, 32, 35, 36 and 38 of the said Judgment).

31. The substance of the Referral to be considered by the Court relates to whether the proposal, election and appointment of the Deputy Mayor for Communities for Peja was constitutional and whether the circumstances surrounding his election and appointment breached any provision of the Constitution. Let us turn therefore to consider the particular statutory provisions that apply to how the Deputy Mayor is elected.

32. Article 61 of the Law on Local Self Government, Law Nr. 03/L-40, dated 20 February 2008, provides for the proposal and election and the duties of the Deputy Mayor for Communities in Municipalities where at least ten percent (10%) of the citizens belong to communities not in the majority in those Municipalities. It provides as follows:

Article 61 Deputy Mayor for Communities

61.1. *There shall be a Deputy Mayor for Communities in those municipalities where at least 10% of the citizens belong to non-majority communities.*

61.2. *The Deputy Mayor for Communities shall be elected for the same term of office as the Mayor.*

61.3. *The appointment and dismissal of the Deputy Mayor for Communities shall be proposed by the Mayor and shall get approval of the majority of the municipal assembly members present and voting and the majority of the municipal assembly members present and voting belonging to the non-majority communities.*

61.4. *The deputy mayor for communities shall assist the Mayor and provide him/her advice and guidance to the Mayor on issues related to the non-majority communities.*

61.5. *When the post of the Deputy Mayor becomes vacant, the Mayor shall appoint a new one no later than thirty days after the vacancy arises according to the procedures of paragraph 3 of this Article.*

61.6 *The Article 59 on the conflict on interest of the Mayor shall apply mutatis mutandis to the Deputy Mayor for Communities.*

33. The mechanism provides for three events to occur for his/her election. The first of these is that the Deputy Mayor for Communities is proposed by the Mayor of the Municipality.

The second is that that the majority of the members of the Municipal Assembly vote for the person proposed. The third event is that a majority of the municipal assembly members present and voting belonging to the non-majority Communities must also vote for him/her.

34. According to the minutes of the meeting of the Municipality Assembly of the 15 February 2010 the first two events occurred. Mr Bajrami was proposed by the Mayor of the Municipality and he received the overwhelming majority of the members of the Municipal Assembly present and voting. However he did not get a majority of the votes of the members belonging to the non-majority Communities. They were tied: two voted for Mr Bajrami and two voted against him.
35. Let us turn therefore to the provisions of Article 48 of the Law on Local Self Government which deals with voting at the Municipal Assembly. It provides:

Article 48 Voting

48.1. At all meetings of the Municipal Assembly and its committees, each member including the chairperson shall have one vote, but the chairperson shall have an additional casting vote if an equal number of votes are cast for and against a proposal.

48.2. Unless otherwise explicitly provided for in this law, decisions of the Municipal Assembly or of a committee shall be adopted by the majority of the members present and voting.

48.3. Abstentions shall be noted for the purpose of establishing the quorum, but shall not otherwise be taken into account for the voting results.

36. Generally, in the event of the casting of an equality of votes, an event that is likely over time, many assemblies, legislatures and parliaments will provide that one person shall have a casting vote in order to avoid deadlock and to enable business to be completed. In the case of the Municipalities in Kosovo this casting vote is given, by the provisions of Article 48.1 quoted above, to the Chairperson of the Assembly. Because of the equality of votes that occurred in the election for the Deputy Mayor for Communities the Chairperson of the Municipal Assembly decided in Mr Bajrami's favour and he was therefore declared elected.
37. The essential question is whether the Chairperson of the Municipal Assembly had the power to give the casting vote in those circumstances. The wording of Article 48.1 refers to "all meetings of the Municipal Assembly and its committees". Certainly the election by the members of the non-majority Communities was not a meeting of a committee of the Assembly. Nowhere does the legislation provide that this business was "committee" business.
38. Therefore, was the election of the Deputy Mayor for Communities by the members of the non-majority Community, the third event referred to above, a "meeting of the Municipal Assembly" in the circumstances where the Assembly had already approved his election by an overwhelming majority? The Court finds that it was not. The vote at that stage was not a vote of the full Municipal Assembly. Instead it was a vote of a subset of the Assembly. A subset that is not contemplated by Article 48.1 and special rules and protections applied to that vote and there was no provision for the use of a casting vote in the event of an equality of votes in those circumstances.
39. Because of the special protections that Communities and their members enjoy under the Constitution and the law this Court is led to the conclusion that there was an interference with the particular rights of the Communities when the Chairperson intervened when the vote split equally. He did not have the right to use a casting vote to resolve that particular

deadlock. The members of the Municipal Assembly who were from the non-majority Community were the only ones who could make that decision for themselves and the law required them to do so by majority.

40. The Court is of the view that participation in voting, and the use of a casting vote by the Chairperson caused a direct influence in the decision for the election of the Deputy Mayor for Communities, which violated the rights of other communities by not respecting their will because the vote in the assembly by the assembly members from communities was a tie: 2 votes in favour and 2 votes against the proposal made by the Mayor.
41. Accordingly, the Applicant's rights guaranteed by Articles 45 and 54 of the Constitution in conjunction with Article 57 of the Constitution have been violated by the election of Mr Bajrami as Deputy Mayor for Communities of Peja on the casting vote of the Chairperson of the Municipal Assembly.

FOR THESE REASONS, THE COURT UNANIMOUSLY DECIDES as follows:

- I. DECLARES that the Referral is admissible;
- II. FINDS that there is a violation of Articles 45 and 54 in conjunction with Article 57 of the Constitution of Kosovo by the election of Mr Ibish Bajrami as Deputy Mayor for Communities of Peja on the casting vote of the Chairperson of the Municipal Assembly;
- III. DECLARES the election of the Deputy Mayor for Communities for the Municipality of Peja held on 15 February 2010 void;
- IV. ORDERS the Municipal Assembly to initiate a new election for the Deputy Mayor for Communities, in conformity with this Judgment;
- V. REQUIRES the Municipal Assembly to report to the Court on the steps it has taken to comply with this Judgment before the expiry of three months from the date of its publication;
- VI. In compliance with Article 20.4 of the Law, the present Judgment shall be communicated to the parties and shall be published in the Official Gazette;
- VII. The present Judgment shall enter into force immediately and may be subject to editorial review.

Judge Rapporteur

Mr.sc.Kadri Kryeziu



President of the Constitutional Court

Prof. Dr. Enver Hasani