



**Republika e Kosovës**  
**Republika Kosova-Republic of Kosovo**  
**Gjykata Kushtetuese / Ustavni sud / Constitutional Court**

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Prishtina, date: 27 January 2010  
Ref.: Nr. RK-04/10

## **RESOLUTION**

**Case No. KI. 41/09,**  
**AAB-RIINVEST University L.L.C., Pristina**  
**versus**  
**Government of the Republic of Kosovo**

### **THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

The Constitutional Court composed of:

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

With Mrs. Njomza Uka, Officer for Case Registration, as minute taker at the Court's deliberations of 25 November 2009 in Case No. KI. 41/09.

#### **The Applicant**

1. The Applicant is a private provider of higher education, bearing the name "AAB-RIINVEST University", with its Headquarters in Pristina and represented by its Secretary, Granit Curri.

#### **The Opposing Party**

2. The Opposing Party is the Government of the Republic of Kosovo.

#### **Subject matter**

3. The Applicant alleges that Decision No. 01/73 of the Government of 7 July 2009, whereby the Applicant was granted the title “College”, is in full contradiction with the Constitution and the Law, in that the Government was not competent to take such a decision. The Applicant holds that the Government’s Decision lacked any constitutional and legal basis and violated Articles 24, 48.2 and 93.4 of the Constitution and Articles 7 and 8.2 of Law No. 03/L-121 on the Constitutional Court.

### **Legal basis**

4. Article. 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law), and Article 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

### **Summary of the proceedings before the Court**

5. On 25 November 2009, the Court decided to reject the Applicant’s request for interim measures, as asked for in the Referral, and, upon the proposal of the Review Panel, composed of the Judges Gjylieta Mushkolaj, Almiro Rodrigues and Altay Suroy and acting under Article 22.6 of the Law, to adjudicate the Applicant’s constitutional complaints on the same day.

### **The facts**

6. By Decision No. 01/73 of 7 July 2009, taken pursuant to Articles 92.4 and 93.4 of the Constitution and Article 4.3 of the Regulation on the Functions of the Government of Kosovo No. 01/2007, and based on the recommendations of the National Quality Council of the Kosovo Accreditation Council, the Government decided that:

1. None of the Private Higher Educational Providers (PHEP) in the Republic of Kosovo can actually take the name University, can grant academic titles for teachers, nor can they offer doctoral studies.

2. Every PHEP in the Republic of Kosovo, which in compliance with the recommendations of the National Quality Council (NQC) of the Kosovo Accreditation Agency (KAA), has fulfilled standards and criteria foreseen by the Law on Higher Education and respective administrative instructions, takes the name “College”.

3. In compliance with the recommendations of the NQC of the KAA, the name “College” is granted to the following PHEP: AAB-RIINVEST,...

7. The PHEP AAB-RIINVEST is granted the status “College” with the following study programs: .....

21. Every PHEP, which has the name “College”, can enroll up to 500 students in the Master programs.

24. The Ministry of Education, Science and Technology is given the authority to grant licenses according to this Decision.

25. The accreditation and the license are legal only for the academic year 2009/2010...

28. This decision enters into force on the day of the signing.”

7. On 23 September 2009, the Applicant filed a constitutional complaint, requesting the Court to evaluate the constitutionality and legality of Decision No. 01/73 of the Government, by which the Applicant was granted the name “College”.

### **The Applicant’s allegations**

8. The Applicant considers that Decision 01/73 is in contradiction with the Constitution and the Law, in that the Government was not authorized and had no constitutional and legal basis for issuing the Decision, as no provision or any bylaws, including the Law on Higher Education and Administrative Instructions No. 14/2003 (Licensing of Private Providers of Higher Education), No. 2/2009 (Accreditation of Institutions of Higher Education) and No. 14/2004 (Establishment of the Kosovo Accreditation Agency), determined the right of the Government to issue a decision, legal act or regulation needed to implement these laws and bylaws.

9. Furthermore, the Applicant considers that the contested decision has violated :

- Article 48.2 (Guarantee of Academic Freedom) of the Constitution, in that the Government, through its decision and contrary to the Law on Higher Education and the Applicant’s right to academic freedom, has set the maximum number of students which can be enrolled by a private provider of higher education and has imposed the term “College” on the Applicant, even though it meets the legal requirements to carry the term “University”.
- Article 24 (Equality before the Law) of the Constitution, in that the Government, through the specified number of accredited programs, has treated private providers of higher education equally regardless of the number of such programs. Even if limiting the number of students would be legal, the proper way would have been proportional treatment based on the number of accredited programs, which meant higher costs with a proportionally smaller income, resulting, therefore, in a materially unequal situation, putting AAB-RIINVEST into a position in breach of Article 24 of the Constitution and not justified under its Article 55.
- Article 93 (Competencies of the Government), paragraph 4, of the Constitution, providing that the Government “makes decisions and issues legal acts or regulations necessary for the implementation of laws”.

10. Finally, the Applicant alleges that, although Article 113.7 of the Constitution requires an applicant to exhaust all legal remedies provided by law, one cannot do so, if there are no legal remedies. In his opinion, this is also true for the Government’s decision, because it is final and cannot be revoked by a party either through an administrative appeal or the beginning of an administrative conflict or through an extraordinary legal remedy.

### **Comments by the Opposing Party**

11. The Opposing Party, to which the Referral was communicated by the Court’s Registry Office on 2 October 2009, has not submitted its comments within the time limit of 45 days, as stipulated by Article 22.2 of the Law.

## **Assessment of the Admissibility of the Referral**

12. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution.

13. In this connection, the Court refers to Article 113.7 of the Constitution, which 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.”

14. The Court first considers that, pursuant to Article 21.4 of the Constitution, which provides that “fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable”, the Applicant is entitled to submit a constitutional complaint, invoking fundamental rights which are valid for individuals as well as for legal persons as the Applicant. This means that the Applicant is equally under the obligation to exhaust all legal remedies provided by law, as Article 113.7 stipulates for individuals.

15. The Court notes, however, that in his Referral, the Applicant has not submitted any evidence whatsoever, that he appealed from the decision of the Government or used any other remedy, which may have been open to him under applicable law in order to challenge the contested decision.

16. The Court wishes to emphasize that the rationale for the exhaustion rule, as interpreted by the European Court of Human Rights (see Article 53 of the Constitution), 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, *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).

17. In this connection, the Court would like to stress that applicants are only required to exhaust remedies that are available and effective. Discretionary or extraordinary remedies need not to be exhausted, for example requesting a court to revise its decision (see, *mutatis mutandis*, ECHR, *Cinar v. Turkey*, no 28602/95, decision of 13 November 2003). Where an applicant has tried a remedy that the Court considers inappropriate, the time taken to do so will not interrupt the running of the four-month time limit (Art. 49 “Deadlines” of the Law), which may lead to the complaint being rejected as out of time (see, *mutatis mutandis*, ECHR, *Prystavka, Rezgui v. France*, no 49859/99, decision of 7 November 2000).

18. As to the present case, the Applicant, after having received the Government's Decision, submitted its constitutional complaints directly to this Court, arguing that there were no legal remedies and that “this is also true for the decision of the Government, which, as such, is final

and cannot be revoked through an administrative appeal or through the beginning of an administrative conflict or an extraordinary remedy.”

19. The Court, however, notes that Chapter IX – Disputes of Law No. 2002/3 on Higher Education in Kosovo of 26 September 2002, in its Section 32, provides that “Every attempt shall be made to resolve disputes between government and public authorities and providers of higher education by negotiation and mediation and it shall be the duty of the Ministry to promote this” (Section 32.1), as well as “If a dispute cannot be resolved by informal means, it may be referred by either party to a court of competent jurisdiction” (Section 32.2).

20. Furthermore, Law No. 02/L-28 on the Administrative Procedure of 22 July 2005, in its Section IX, provides that “Any interested party has a right to appeal against an administrative act or against unlawful refusal to issue an administrative act” (Article 127.2), while “The administrative body the appeal is addressed to shall review the legality and consistency of the challenged act” (Article 127.3). “The interested parties may address the court only after they have exhausted all the administrative remedies of appeal (Article 127.4).

21. However, in its submissions, the Applicant has not substantiated in whatever manner, why it considers that the legal remedies mentioned in both laws would not be available and, if available, would not be effective and, therefore, not need to be exhausted.

22. In these circumstances, the Applicant cannot be considered to have fulfilled the requirements under Article 113.7 of the Constitution.

### **FOR THESE REASONS**

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Article 55 of the Rules of Procedure, by majority vote,

### **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**

Snezhana Botusharova

**President of the Constitutional Court**

Prof. Dr. Enver Hasani

