



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

Prishtina, on 11 April 2018  
Ref. No.: RK 1213/18

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI11/18**

Applicant

**Kosovo Chamber of Commerce**

**Constitutional review of Judgment Rev. No. 181/2017 of the Supreme  
Court of Kosovo, of 18 September 2017**

### **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 Referral was submitted by Kosovo Chamber of Commerce, with seat in Prishtina (hereinafter: the Applicant), represented by Fatmire Mjeku, Legal Officer, based on the power of attorney given by the Secretary General of the Applicant.

## **Challenged decision**

2. The Applicant challenges Judgment Rev. No. 181/2017, of the Supreme Court of Kosovo (hereinafter: the Supreme Court) of 18 September 2017.

## **Subject matter**

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant's rights guaranteed by Article 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention).
4. The Applicant also requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure "*to suspend the legal effects and the enforcement of [the challenged decision] until the date of publication of the final judgment on this Referral*".

## **Legal basis**

5. The Referral is based on Articles 21.4 and 113.7 of the Constitution, Articles 22 and 47 of the 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 Court**

6. On 18 January 2018, the Applicant submitted the Referral to the Court.
7. On 19 January 2017, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.
8. On 26 January 2018, the Court notified the Applicant Person H.D. from Prishtina as a claimant in the procedure before the regular court (hereinafter: the claimant) about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 2 March 2018, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

## **Summary of facts**

10. The Claimant had established regular employment relationship with the Applicant until 3 February 2009.



11. On 3 February 2009, the Applicant and the claimant entered into new employment contract for a period of 12 (twelve) months from 5 January 2009 to 31 December 2009.
12. On 12 January 2010, the Applicant rendered Decision No. 31 on the non-extension of the employment contract with the claimant and compensation of 50% of the pay for a 6 (six) month period (hereinafter: Decision 31).
13. On 21 January 2010, the claimant filed a complaint with the Applicant against the Decision 31 of 12 January 2010.
14. On 9 February 2010, the Applicant (Decision No. 83/a) rejected the complaint of the claimant as ungrounded and upheld Decision No. 31 of 12 January 2010, specifying that the non-extension of the employment contract was a result of the closure of several job positions in the new organizational structure of the Applicant.
15. On an unspecified date, the claimant filed a claim against the Applicant requesting the annulment of Applicant's Decisions No. 31, of 12 January 2010 and No. 83/1 of 9 April 2010, considering that she had established employment relationship with the Applicant for more than 30 (thirty) years and that the contract was terminated without any work evaluation.
16. On 12 April 2012, the Municipal Court in Prishtina (hereinafter: the Municipal Court), by the Judgment (C. No. 456/10), rejected as ungrounded the statement of claim of the claimant for annulment of the Applicant's decisions mentioned above, reasoning that the employment contract of 3 February 2009 was of a fixed duration and the termination of the employment relationship came as a result of the time limit set in the employment contract.
17. On 18 October 2012, the claimant filed an appeal against the Judgment of the Municipal Court (C. No. 456/10) with the Court of Appeals of Kosovo (hereinafter: the Court of Appeals).
18. On 3 July 2013, the Court of Appeals by the Decision (CA. No. 1309/2013) rejected the claimant's appeals on the grounds that the appeal was submitted out of time.
19. On an unspecified date, the claimant filed a revision against the Decision of the Court of Appeals (CA. No. 1309/2013) for essential violation of the provisions of the contested procedure and erroneous application of the substantive law.
20. On 8 October 2013, the Supreme Court, by Decision (Rev. No. 232/2013) approved the revision of the claimant and annulled the Decision of the Court of Appeals (CA. No. 1309/2013) and remanded the case to the Court of Appeals for retrial, with the reasoning that there was no evidence that lawyer J.M., who had received the Decision of the Court of Appeals (CA. No. 1309/2013), was authorized to represent the claimant. Therefore, the deadline for filing the appeal must be calculated from the date when the claimant received the Judgment of the Basic Court.



21. On 20 November 2013, the Court of Appeals quashed the Judgment of the Municipal Court (C. No. 456/2010) and remanded the case for retrial to the Basic Court in Prishtina (hereinafter: the Basic Court).
22. On 3 February 2014, the Basic Court rendered Judgment C. No. 3070/2013, by which rejected as ungrounded the claim of the claimant for annulment of the Applicant's decisions on termination of the claimant's employment relationship. The Basic Court reasoned that the claimant had employment relationship for more than 30 (thirty) years, but with the signing of the contract of 3 February 2009, the claimant agreed that the new employment relationship was of a fixed duration. Therefore, the termination of employment relationship is a result of the expiration date established in the employment contract.
23. The claimant filed an appeal against the Judgment of the Basic Court (C. No. 3070/2013) with the Court of Appeals, alleging erroneous and incomplete determination of factual situation, essential violation of the provisions of the contested procedure and erroneous application of the substantive law. The Applicant requested the Court of Appeals to modify the Judgment of the Basic Court and oblige the Applicant to reinstate the claimant to the working place with all rights from the date of termination of the employment relationship.
24. On 18 April 2017, the Court of Appeals rendered Judgment Ae. No. 1674/2014, by which rejected the appeal of the claimant as ungrounded and upheld the Judgment of the Municipal Court (C. No. 456/2010).
25. Against the Judgment of the Court of Appeals (Ae. No. 1674/2014), the claimant submitted a revision to the Supreme Court, on the grounds of essential violations of the provisions of the contested procedure and erroneous application of substantive law. The claimant alleged that it was unlawful to terminate the employment relationship of 33 years with the Applicant by signing a fixed-term contract, while hiring new employees instead. The Applicant submitted a response to the revision of the claimant by challenging the claimant's revision.
26. On 18 September 2017, the Supreme Court, by Judgment Rev. No. 181/2017, approved the revision of the claimant as grounded and modified Judgment Ac. No. 1674/2014 of the Court of Appeals and Judgment C. No. 3070/2013 of the Basic Court, so that it annulled the Applicant's decisions on non-extension of the employment contract for the claimant and obliged the Applicant to reinstate the claimant to work.
27. The Supreme Court, *inter alia*, reasoned that the tasks which the claimant performed with the Applicant "do not have a temporary or from time to time nature, but a permanent nature, and that the claimant has established an indefinite employment relationship, to which conclusion leads us the uncontested fact that the claimant worked for the respondent for about 33 years." The Supreme Court further reasons that "the employment relationship for an indefinite period was established in accordance with the provision of Article 10.1 item (a) of the Basic Labor Law in Kosovo, UNMIK Regulation No. 2001/27. [Subsequent signing of a new fixed-term contract] is in



*contravention with paragraph 4 of Article 10 of the aforementioned law, as the employment contract should not include provisions restricting employees' rights or stipulating less favorable conditions to those set out in this Regulation, and, where appropriate, by collective agreement. This is so, because the work duties were of a permanent nature and that such a [fixed-term] contract of employment is in contradiction with, not only the above mentioned legal provisions, but also with the principle of honesty and conscientiousness set out in Article 12 of the Law on Obligational Relationships, in which case the claimant by the challenged contract is placed in a state of legal uncertainty of the employment relationship, with the extension of the employment relationship for a fixed period, even though she has worked for up to 33 years."*

28. On 30 October 2017, the Applicant issued Decision No. 457 for reinstatement of the claimant to work based on the Judgment of the Supreme Court (Rev. No. 181/2017).

### **Applicant's allegations**

29. The Applicant alleges that the Supreme Court (Judgment Rev. No. 181/2017) has violated his right to a fair trial under Article 6 of the Convention, and the right to appeal under paragraph 5 of Article 102 of the Constitution.
30. The Applicant states that the Supreme Court has exceeded its jurisdiction after assessing the new evidence which were not presented before the lower courts, did not send the case for retrial, but decided on the merits of the case, by denying the Applicant's right to file appeal to a court decision on the merits of the case, and by incorrectly assessing the validity of the respondent's employment contract.
31. The Applicant also alleges that the Supreme Court did not correctly reason its decision, because *"The challenged Judgment has reduced without any logical continuity between the starting point of reasoning and its conclusion"*.
32. The Applicant also alleges that *"the Supreme Court had a positive bias against the claimant and was not an impartial arbiter between the parties as required by Article 6.1 of ECHR. In addition to the aforementioned evidence, the most irrefutable evidence of this allegation is the open advise that the Supreme Court gives [to the claimant] to initiate a new court proceeding to apply for salaries for the period of unjust dismissal from work"*.
33. The Applicant in connection with the request for interim measure emphasizes that *"[m]ay reasonably suppose that the Judgment of the Constitutional Court regarding this Referral will be published after about 10 months from the date of filing the Referral. During these 10 months, the challenged Judgment will produce legal effects and financial consequences."*
34. Finally, the Applicant requests the Court to annul, as incompatible with Article 6.1 of the Convention and the Constitution, Judgment Rev. No. 181/2017 of the Supreme Court and to remand the case for retrial by another panel of the Supreme Court.

## Admissibility of Referral

35. The Court first examines whether the Referral has fulfilled the admissibility requirements, established in the Constitution and further specified in the Law and foreseen in the Rules of Procedure.
36. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

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

*[...]*

*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”.*

37. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

*“The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision [...].”*

38. Regarding the foregoing, the Court finds that the Applicant has submitted the Referral as an authorized party, submitted the Referral within the deadlines established in Article 49 of the Law and after exhaustion of all legal remedies provided by law.

39. However, the Court further refers to Article 48 [Accuracy of the Referral] of the Law, which foresees that:

*“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 challenged.”*

40. In addition, the Court recalls Rule 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure, which provides that:

*“(1) The Court may consider a referral if: d) the referral is prima facie justified or not manifestly ill-founded.*

*(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*

*[...]*

*b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or*

*[...]*

*(d) the Applicant does not sufficiently substantiate his claim.”*



41. Regarding the allegation of the Applicant, the Supreme Court modified the decision of lower instance courts without remanding the case for retrial, thereby denying the Applicant's right to challenge the claimant's evidence and appeal the decision, the Court notes that the right to a fair trial as guaranteed by Article 6 of the Convention includes the right of the parties to the hearing to submit any evidence or observations that they consider relevant to their case. Another element of a "fair hearing" is the principle of equality of arms, which requires a fair balance between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent or opponents (See, *mutatis mutandis*, ECtHR case *Andrejeva v. Latvía*, No. 55707/00, Judgment of 18 February 2009, para. 96).
42. However, the Court also recalls that the right to a fair trial as envisaged in Article 31 of the Constitution and Article 6 of the Convention does not compel the Contracting States to set up courts of appeal, or to allow appeals against the decisions of the Supreme Court, when it decides the case on merits. However, where such institutions do exist, the proceedings before them must comply with the guarantees of Article 6 of the Conventions, in that it guarantees to litigants an effective right of access to the courts for the determination of their civil rights and obligations. (See, *mutatis mutandis*, case of ECtHR *Andrejeva v. Latvía*, no. 55707/00, Judgment of 18 February 2009, para. 97).
43. The Court also recalls Article 224 of the Law on Contested Procedure that foresees "*If the court of revisions ascertains that the material good right was applied wrongfully, through a decision it approves the revision presented or changes the decision attacked*". Therefore, the Supreme Court, using its legal powers and based on the factual situation determined by the Basic Court and the Court of Appeals, and based on the revision and response to the revision, modified the decisions of the Basic Court and the Court of Appeals.
44. Regarding the Applicant's allegation that by not allowing the Applicant to appeal the Judgment of the Supreme Court, the Supreme Court had violated paragraph 5 of Article 102 [General Principles] of the Constitution, the Court recalls that it is a general principle that the Articles of the Constitution which do not directly regulate the human rights have no independent effect, since it has effect solely in relation to "*the enjoyment of the rights and freedoms*" safeguarded by the provisions under Chapter II and III of the Constitution. Accordingly, these articles cannot individually be applied if the facts of the case do not fall within the ambit of one or more of those provisions of the Constitution regarding "*the enjoyment of the rights and freedoms*" (see, *inter alia*, Judgment of ECtHR: *E.B. v. France*, of 22 January 2008, paragraph 47; *Vallianatos and others v. Greece*, of 7 September 2013, paragraph 72; also case KI135/16, Applicant *Vllaznim Bytyqi*, Resolution on Inadmissibility of 23 January 2017, para. 40).
45. Moreover, paragraph 5 of Article 102 of the Constitution stipulates that "[t]he right to appeal a court decision is guaranteed, unless otherwise provided by law". In this regard, the Court recalls that, according to the applicable legislation, against the decisions of the Supreme Court regarding the revision, an appeal is not allowed.



46. As to the allegation of the Applicant that the Supreme Court violated the principle of impartiality by advising the party about the procedure to be followed in order to realize salaries and rights from the Applicant, the Court recalls that the claimant raised the issue of recognition of her rights from the day of her dismissal by claim, but also in the appeal against the Judgment of the Basic Court with the Court of Appeals.
47. In this regard, the Supreme Court by addressing the statement of claim as a whole, had only clarified the reasons why the Supreme Court could not address the issue of the Applicant's employment rights after her dismissal from work, stating that the fact that the Supreme Court could not address this issue *"does not mean that the claimant in another separate dispute has no right to seek compensation of wages during the time her employment relationship has not been extended until her reinstatement to work with the respondent."*
48. Therefore, only for the fact that the Supreme Court has reasoned its decision with respect to the part of the statement of claim regarding the claimant's employment rights after her dismissal from work, cannot constitute a reason to conclude that the Supreme Court did not respect the principle of impartiality as required by the right to a fair trial.
49. Regarding the allegation of the Applicant that the Supreme Court did not reason its decision as it failed to provide a logical continuity between the starting point of the reasoning and its conclusion, the Court recalls that the Supreme Court reasoned its decision based on the factual situation determined by the Basic Court and the Court of Appeals, as well as on the applicable legal norms at the time of dismissal of the Applicant from work.
50. In this regard, the Supreme Court specified that *"due to the fact that the works performed by the claimant with [the Applicant] do not have a temporary or from time to time nature, but a permanent nature, and that the claimant has established an indefinite employment relationship, to which conclusion leads us the uncontested fact that the claimant worked for the respondent for about 33 years. This type of employment relationship was established for an indefinite period in accordance with the provision of Article 10.1 item (a) of the Basic Labor Law in Kosovo, UNMIK Regulation No. 2001/27, which law was in force, when the challenged employment contract was signed [fixed-term contract]. This contract is in contravention with paragraph 4 of Article 10 of the aforementioned law, as the employment contract should not include provisions restricting employees' rights or stipulating less favorable conditions to those set out in this Regulation, and, where appropriate, by collective agreement. This is so, because the work duties were of a permanent nature and that such a [fixed-term] contract of employment is in contradiction with, not only the above mentioned legal provisions, but also with the principle of honesty and conscientiousness set out in Article 12 of the Law on Obligational Relationships, in which case the claimant by the challenged contract is placed in a situation of legal uncertainty of the employment relationship, with the extension of the employment relationship for a fixed period, even though she has worked for up to 33 years."*  
[...]



*By the provisions of Articles 11 and 12 of the Basic Labor Law in Kosovo, the legal grounds for termination of the employment relationship have been established, but the case file do not show that any of the legal grounds for termination of the employment relationship has been met, therefore, the challenged decisions cannot have legal influence on the termination of the claimant's employment relationship."*

51. Therefore, the Court considers that the reasoning given by the Supreme Court, when referring to the modification of the Judgment of the Basic Court and the Court of Appeals is reasoned and well-founded. In addition, the Court notes that the Supreme Court applied procedural and substantive provisions regarding the Applicant's case as well as their conclusions were reached after a detailed examination of all the arguments presented by the Applicant and the respondent as well as by the facts established by the Basic Court and the Court of Appeals.
52. In sum, regarding the aforementioned allegations, the Court reiterates that it is not the role of the Constitutional Court to deal with errors of facts or law, allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law. See, *mutatis mutandis*, European Court of Human Rights (hereinafter: the ECtHR) case *Garcia Ruiz v. Spain*, No. 30544/96, para. 28.
53. The role of the Constitutional Court is solely to ensure the compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as "fourth instance court" (see, ECtHR case *Akdivar v. Turkey*, No. 21893/93, Judgment of 16 September 1996, para. 65; see, also, *mutatis mutandis*, Constitutional Court: case KI86/11, Applicant: *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
54. In other words, full determination of the factual situation and the correct application of the law is within the full jurisdiction of the regular courts (issue of legality).
55. The mere fact that the Applicants disagree with the outcome of the case, cannot of itself raise an arguable claim for a violation of their rights protected by the Constitution.
56. The Constitutional Court can only consider whether the evidence was presented and whether the proceedings viewed in its entirety have been conducted in such a way that the Applicant had a fair trial (see: *inter alia*, case *Edwards v. United Kingdom*, No. 13071/87, Report of European Commission of Human Rights, adopted on 10 July 1991).
57. In this respect, the Court considers that the reasoning given by the regular courts, referring to the Applicant's allegations of violation of procedural and substantive law, is justified, and that the proceedings before the regular courts

were not unfair or arbitrary (see: ECtHR, case *Shub v. Lithuania*, No. 17064/06, Decision of 30 June 2009).

58. Therefore, in the present case, the Court considers that the facts presented by the Applicant do not in any way justify the alleged violation of constitutional rights invoked by it, and that he has not sufficiently substantiated its allegation, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rules 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure.
59. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible.

#### **Request for interim measure**

60. The Court recalls that the Applicant also requests the Court to render a decision on the imposition of interim measure, namely the prohibition on the execution of the Judgment of the Supreme Court.
61. The Court has just concluded that the Applicant's Referral is manifestly ill-founded on constitutional basis, and as such inadmissible.
62. Therefore, in accordance with Article 27.1 of the Law and Rule 55 (4) of the Rules of Procedure, the request for interim measure is rejected as ungrounded.



## FOR THESE REASONS

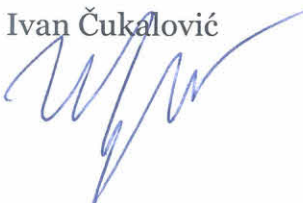
The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 27.1 and 48 of the Law, and in accordance with Rule 36 (1) (d), (2) (b) and 55 (4) of the Rules of Procedure, on 2 March 2018, unanimously

## DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the request for interim measure as ungrounded;
- 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; and
- IV. This Decision is effective immediately;

**Judge Rapporteur**

Ivan Čukalović



**President of the Constitutional Court**

Arta Rama-Hajrizi

