



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

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Prishtina, on 4 April 2018  
Ref. no.: RK 1206/18

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI79/17**

Applicant

**Vahide Badivuku**

**Constitutional review of  
Decision AA. No. 01/2017 of the Supreme Court of Kosovo  
of 8 February 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 Vahide Badivuku, with residence in Vushtri (hereinafter, the Applicant).

## **Challenged decision**

2. The Applicant challenges the Decision E. Rev. no. 01/2017 of the Supreme Court of 8 February 2017, which rejected as inadmissible the Applicant's submission against the Decision KPK. No. 501/2016 of the Kosovo Prosecutorial Council of 21 December 2016 and Decree No. DP-002-2017 of the President of the Republic of Kosovo, of 17 January 2017.
3. The challenged Decision was served on the Applicant on 6 March 2017.

## **Subject matter**

4. The subject matter is the constitutional review of the challenged Decision which allegedly violated the rights of the Applicant guaranteed by paragraphs 2 and 5 of Article 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).

## **Legal basis**

5. The Referral is based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

## **Proceedings before the Court**

6. On 5 July 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
7. On 13 July 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of the judges Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.
8. On 25 July 2017, the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Supreme Court and the Kosovo Prosecutorial Council.
9. On 27 July 2017, the Court received comments from the Kosovo Prosecutorial Council.
10. On 11 January 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**

11. The Applicant served as a state prosecutor in the Serious Crimes Department with the Basic Prosecution in Mitrovica.



12. On 23 September 2015, the Disciplinary Committee (Decision KPK/KD/No. 12/2015) within the Kosovo Prosecutorial Council (hereinafter, the Disciplinary Committee) *"confirmed that the Prosecutor Vahide Badivuku carried out a professional misconduct"* and imposed the disciplinary measure of suspension without pay.
13. On 5 October 2017 the Applicant filed with the Kosovo Prosecutorial Council (hereinafter, the KPC) an appeal *"on the grounds of erroneous assessment or incomplete evidence of the factual situation and erroneous application of the law on sanction"*.
14. On 8 October 2015, the KPC (Decision KPK/KD/No. 260/2015) rejected the Applicant's appeal as ungrounded.
15. On 17 November 2016, the Disciplinary Committee (Decision KPK/KD/No. 08/2016) *"imposed disciplinary measure Proposal [to the President of the Republic] for dismissal from the duty of the State Prosecutor (...), because she was found guilty of the criminal offence Accepting Bribes (...) and the criminal offence of abusing official position or authority (...) as well as accessory punishment prohibition on exercising public administration or public service functions for a period of time of 3 (three) years"*.
16. The Disciplinary Committee based its decision referring to Judgment PKR. No. 652/2015 of 5 April 2016 of the Basic Court in Prishtina, which found the Applicant guilty of the charged criminal offenses and upheld the Judgment PAKR. 350/2016 of the Court of Appeals, of 19 September 2016.
17. On 9 December 2017, the Applicant filed an appeal with the Kosovo Prosecutorial Council, alleging that *"the Disciplinary Commission of the Kosovo Prosecutorial Council, on the occasion of rendering the decision, violated the provisions of the disciplinary procedure, they did not determine fairly and completely the factual situation, let alone the imposition of the disciplinary measure of the proposal for discharge from the position of the State Procedure"*.
18. The Applicant claimed that she hadn't yet exhausted all available legal remedies and that a request for protection of legality against the aforementioned Judgments of the Basic Court in Prishtina and the Court of Appeals was still pending before the Supreme.
19. On 21 December 2016, the KPC (Decision KPK/KD/No. 501/2016) rejected as ungrounded the Applicant's appeal and upheld the Decision of the Disciplinary Committee. In addition, the KPC *"recommends to the President to discharge Mrs. Vahide Badivuku from the position of Prosecutor"*.
20. On 17 January 2017, the President of the Republic of Kosovo (Decree No. DP-002-2017) decreed that *"Mrs. Vahide Badivuku is discharged from the position of State Prosecutor"* and that *"this Decree enters into force upon its signature"*.
21. On 27 January 2017, the Applicant filed with the Supreme Court an appeal against the Decision (KPK. No. 501/2016) of the KPC and the Decree (No. DP-

002-2017) of the President of the Republic of Kosovo, alleging that *“they violated the substantive law, namely the provisions of the Constitution on the occasion of imposing the disciplinary measure to be proposed for discharge from the duties of State Prosecutor”*.

22. The Applicant claimed that *“they did not wait for me to exhaust all the extraordinary legal remedies as it is the request for protection of legality, which is under the procedure of decision in the Supreme Court of Kosovo”*.
23. On 8 February 2017, the Supreme Court (E. Rev. no. 01/2017) dismissed the Applicant’s appeal as impermissible, because *“according to Article 104, item 5, of the Constitution of the Republic of Kosovo, (...) the judges have the right to appeal against the Decision on discharge directly to the Supreme Court of Kosovo”*; while no constitutional provision or other law stipulates *“the right to appeal directly to the Supreme Court of Kosovo against a Decision of the Kosovo Prosecutorial Council or the Decision on discharge”*.

### **Applicant’s allegations**

24. The Applicant claims that the challenged decision violated her rights guaranteed by Article 102 (2) and (5) of the Constitution which *“ensures equal access to the courts”* and guarantees *“the right to appeal a judicial decision (...)”*.
25. The Applicant alleges that Article 104 (5) of the Constitution *“speaks about judges and (...) in an analogue way should be applied also for the prosecutors”*.
26. The Applicant relies on ECtHR case law (*Brumarescu v. Romania*) to allege that *“the refusal of a court to accept a jurisdiction to adjudicate a matter filed before it with the reasoning that the courts has no jurisdiction to assess the request for control against any violation of a certain human right (...) was considered as a violation of the right to access to the court”*.
27. The Applicant also claims that the challenged decision was taken without *“the criminal proceedings (...) have not yet been finished in all court instances”* since *“the case was in the Supreme Court upon the request for protection of legality”* and thus *“my guilt has not been yet established”*.
28. In addition, the Applicant considers that the Supreme Court *“has violated the right to access to the Court, as in this way it failed to deal with a case of individual violation and this is in conjunction with the violation of the right to fair and impartial trial”*.
29. Finally, the Applicant requests the Court *“to hold that [her] right for access to the court has been violated”* and *“this matter be remanded to the Supreme Court in order to review the issue of the decisions of the disciplinary committees and the Decree of the dismissal”*.

### **Comments of the KPC**

30. The KPC just informed that it *“has received Judgment of the Court of Appeals”* and based on it decided *“on the approval of the Decision of the Disciplinary*



*Committee on imposition of the disciplinary measure proposal for dismissal from the office of the State Prosecutor”.*

### **Admissibility of the Referral**

31. The Court examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.
32. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes:

*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.*

33. 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. [...].*

34. In that connection, the Court notes that the Applicant is an authorized party, challenges an act of the Supreme Court as a public authority, has exhausted the legal remedies available to her and has submitted her referral within the provided four (4) months period.

35. However, the Court further refers to Article 48 of the Law which provides:

*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.*

36. In addition, the Court refers to Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, which foresees:

*(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:*

*[...]*

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

37. The Court recalls that the Applicant alleges that the challenged decision violated her rights guaranteed by Article 102 (2) and (5) of the Constitution which “ensures equal access to the courts” and guarantees “the right to appeal a judicial decision (...)”. In this respect, the Applicant claims that 104 (5) of the Constitution “speaks about judges and (...) in an analogue way should be applied also for the prosecutors”.
38. The Court observes that Supreme Court in its Decision considered that “according to Article 104, item 5, of the Constitution of the Republic of Kosovo, (...) the judges have the right to appeal against the Decision on discharge directly to the Supreme Court of Kosovo”. In this regard, the Supreme Court held that no constitutional provision or other law stipulates “the right to appeal directly to the Supreme Court of Kosovo against a Decision of the Kosovo Prosecutorial Council or the Decision on discharge” and accordingly dismissed the Applicant’s appeal as impermissible.
39. In that respect, the Court considers that it cannot be established that there is an arbitrariness in the interpretations given by the Supreme Court. Furthermore, the Court considers that the Supreme correctly reasoned and concluded that a right to appeal directly to the Supreme Court of Kosovo against a decision of Kosovo Prosecutorial Council or decree on discharge was neither foreseen by the constitutional provisions nor by the law in force.
40. At the outset, the Court recalls Article 53 [Interpretation of Human Rights Provisions] which establishes that “human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Rights” Thus, the Constitutional Court, as “the final authority in Kosovo for the interpretation of the Constitution” (Article 112 of the Constitution), is bound to take into account the case law of the ECtHR when assessing alleged violations of human rights and fundamental freedoms guaranteed by the Constitution.
41. In this regard, Court considers that the right to access to a court is not and cannot be absolute. In fact, it has been subject to restrictions (especially when it comes to assumptions regarding the admissibility of legal remedies), since it requires the regulation of the state in its own nature, which has a certain margin of appreciation in that regard. However, such limitations shall not diminish access to the court in such a manner or to such an extent that the very essence of the “right to a court” is violated. Such limitations will also not be considered in accordance with Article 54 of the Constitution, unless they are prescribed for the achievement of a legitimate aim or there is no reasonable relationship of proportionality between the means used and the intended purpose.
42. The Constitutional Court notes that the Applicant had access to the Supreme Court, but only to the extent on which the Applicant’s appeal was dismissed as impermissible. The Supreme Court, while interpreting the Constitution, considered that the right to appeal to the Supreme Court in case of dismissal from the office is granted for the Judges; not for the prosecutors.



43. Thus, the Court considers that the Applicant was not denied the right to access to a Court while her appeal was rejected for procedural grounds. The Applicant could have realized her right to legal remedy in another competent court, in accordance with the applicable law.
44. The Court further considers that mere doubts regarding the effectiveness of a particular remedy will not absolve the Applicant from the obligation to try it. (See ECtHR case *Epözdemir v. Turkey*, Application no. 57039/00, Decision as to admissibility, 31 January 2002).
45. On the contrary, it is up to the Applicant to apply to the appropriate court and to allow to it the opportunity to assess the alleged violation of rights through exercising its competence of legal interpretation. (See ECtHR case *Ciupercescu v. Romania*, Application no 35555/03, Judgment of 15 June 2010, § 169).
46. In sum, the Court considers that the Applicant has not proved and substantiated that the challenged Decision was unfair or arbitrary. (See ECtHR case *Shub vs. Lithuania*, Application No. 17064/06, Decision of 30 June 2009).
47. In that respect, the Court reiterates that it is not its task under the Constitution to act as a “court of fourth instance”, in respect of the decisions taken by the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. (See ECtHR case: *Garcia Ruiz vs. Spain*, no. 30544/96, Judgment of 21 January 1999; see also Constitutional Court case No. KI70/11, Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility, of 16 December 2011).
48. The mere fact that the Applicant disagrees with the Decision of the Supreme Court, cannot of itself, raise an arguable claim for a breach of the Constitution. (See ECtHR case *Mezotur Tiszazugi Tarsulat vs. Hungary*, Application No.5503/02, Judgment of 26 July 2005).
49. Based on the foregoing, the Court considers that the Applicant failed to substantiate her allegation on violation of her right to access to a court.
50. Therefore, in accordance with Article 48 of the Law and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, the Court finds that the Referral is manifestly ill-founded on a constitutional basis and, accordingly, it is inadmissible.

## FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 (7) of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, in the session held on 11 January 2018, unanimously

## DECIDES

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

**Judge Rapporteur**



Almiro Rodrigues

**President of the Constitutional Court**



Arta Rama-Hajrizi