



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

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Prishtina, on 29 May 2018  
Ref. No.: RK 1239/18

## RESOLUTION ON INADMISSIBILITY

in

**Case No. KI141/17**

Applicant

**Halit Memaj**

**Constitutional review of Judgment Rev. No. 116/17 of the Supreme Court  
of Kosovo of 26 June 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 Gërzhaliu-Krasniqi, Judge and  
Gresa Caka-Nimani, Judge.

#### **Applicant**

1. The Referral was submitted by Halit Memaj (hereinafter: the Applicant), residing in Prizren, who is represented by Naim Qelaj, a lawyer.

## **Challenged decision**

2. The Applicant challenges Judgment Rev. No. 116/17 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) of 26 June 2017, which upheld Decision Ac. No. 3504/15 of the Court of Appeals in Prishtina of 20 February 2017, and Decision C. No. 415/13 of the Basic Court in Prizren of 13 July 2015.
3. The challenged Judgment was served on the Applicant on 24 August 2017.

## **Subject matter**

4. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant's rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 49 [Right to Work and Exercise Profession], Article 53 [Interpretation of Human Rights Provisions], Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, and Article 6.1 of the European Convention on Human Rights hereinafter: the Convention).

## **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 the 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 Constitutional Court**

6. On 24 December 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 1 December 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Selvete Gërxhaliu-Krasniqi.
8. On 27 November 2017, the Court notified the Applicant about the registration of Referral KI141/17 and sent a copy of the Referral to the Supreme Court, in accordance with Article 22 of the Law.
9. On 6 December 2017, the Court requested the evidence from the Applicant to confirm the date of receipt of the challenged Judgment.
10. On 13 December 2017, the Court also requested the Basic Court in Prizren to submit information regarding the date of receipt of the challenged Judgment.
11. On 5 January 2018, the Applicant through his representative notified the Court that the challenged Judgment was served on him on 24 August 2017.

12. On 18 January 2017, the Basic Court in Prizren also submitted to the Court the information confirming the date of receipt of the challenged Judgment by the Applicant.
13. On 20 April 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**

14. On 18 November 1999, the Applicant was employed in the Kosovo Energy Corporation (KEK) in the position of electrician, where he worked until 10 April 2013.
15. On 14 March 2013, KEK Internal Audit (notification No. 492) issued the report [No. 2013AO-003], by which it was ascertained that the Applicant misused the work duties.
16. On 26 March 2013, the Executive Director of the KEK District in Prizren, by Decision [No. 547/1], qualified the Applicant's actions as a serious breach of work duties under Article 7, paragraph 1, item (f) of the KEK Disciplinary Code. For this reason, the Applicant's employment contract was terminated, based on Article 70.4 of the Law on Labor, and Article 50.3, in conjunction with paragraph 1.c) of the same Article of the Law on Labor.
17. On 27 March 2013, the Applicant filed a request for reconsideration of the Decision [no. 547/1] of the first instance with the second instance of KEK, with the proposal that the said decision be annulled and his request for reinstatement to work be approved.
18. On 5 April 2013, KEK second instance authority rejected the Applicant's request for reconsideration of the Decision [No. 547/1] of the first instance authority, upholding it as lawful.
19. On 20 May 2013, the Applicant filed a claim with the Basic Court in Prizren with the proposal to annul the decisions of KEK authorities in Prizren on terminate ofon the employment contract and to approve his claim for reinstatement to work.
20. On 13 July 2015, the Basic Court in Prizren, by the Judgment [C. No. 415/13] rejected the Applicant's statement claim in entirety and found that "*... the employment contract was terminated due to the serious violation of the duties provided for in Article 7 paragraph 7 of the Disciplinary Code of the respondent (KEK)*".
21. On 3 August 2015, the Applicant filed an appeal with the Court of Appeals in Prishtina and requested that the Judgment [C. No. 415/13], of the Basic Court in Prizren be annulled and the case be remanded for retrial to the court of first instance or to modify the judgment as such and to approve the Applicant's statement of claim for reinstatement to his working place.

22. On 20 February 2017, the Court of Appeals in Prishtina, by Judgment [Ac. No. 3504/15], rejected the Applicant's appeal and thereby upheld the Judgment [C. No. 415/13], of the Basic Court in Prizren.
23. On 5 April 2015, the Applicant filed a request for revision with the Supreme Court, on the grounds of essential violations of the provisions of the procedural and substantive law.
24. On 29 June 2017, the Supreme Court, by the Judgment [Rev. No. 116/17], rejected the Applicant's request for revision, with the reasoning that the second instance court completely and correctly determined the factual situation, correctly applied the substantive law and that the challenged Judgment does not contain essential violations of the provisions of the contested procedure.

### **Applicant's allegations**

25. The Applicant alleges that the regular courts violated his right protected by Article 24 of the Constitution because the termination of the employment contract was unlawful and was based on discriminatory grounds.
26. The Applicant also alleges violation of Article 31 of the Constitution in conjunction with Article 6 of the Convention due to the fact that: a) he was not provided with adequate judicial protection; b) the evidence in his favor was not taken into account; and c) the Applicant's criminal liability has not been established by any fact, thus he was convicted without a final court decision and on the basis of guilt without being proved by any court decision, the disciplinary measure was imposed and the employment relationship was terminated, while the Court has not assessed this fact at all.
27. The Applicants also alleges violation of Articles 49, 53 and 55 of the Constitution, claiming that *"the Supreme Court has erroneously interpreted the substantive provisions of the labor law to the detriment of the employee, who was unjustly injured by an unlawful decision"*.
28. Finally, the Applicant requests the Court to approve the Referral as admissible, to hold that there has been a violation of Articles 24, 31, 49, 53, 55 of the Constitution and Article 6.1 of the Convention, and to declare invalid and remand for reconsideration Judgment [Rev. no. 116/17] of the Supreme Court of 29 June 2017.

### **Admissibility of the Referral**

29. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution and as further specified in the Law and foreseen in the Rules of Procedure.
30. 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.”

31. 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.”*

32. In accordance with the abovementioned Articles, the Court considers that the Applicant is an authorized party, that he exhausted all available remedies and that he filed the Referral in time.

33. In addition to the abovementioned provisions, the Court also takes into account the requirements of Article 48 [Accuracy of the Referral] of the Law as well as Rule 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure:

*“48. 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 (1). The Court may consider a referral if:*

*[...]*

*(d) the referral is prima facie justified or not manifestly ill-founded.*

*36 (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.*

*[...]*

*d) the referral is prima facie justified or not manifestly ill-founded”.*

34. The Court recalls that the Applicant claims that the regular courts violated his rights, protected by Articles 24, 31, 49, 53 and 55 of the Constitution, and Article 6 of the Convention.

35. Regarding the Applicant's allegation of violation of Article 24 [Equality Before the Law] of the Constitution, the Court recalls, first of all, that, as a general rule, the “equality before the law” means the equality of individuals that are under equal conditions and the right to equal protection before the law without discrimination. However, the equality before the law does not mean that an individual or a category of persons who are objectively in different conditions, have similar treatment and choices.

36. The Court also emphasizes that in the circumstances of the court proceedings, which is reviewed and adjudicated, “the equality before the law” should be

understood as a right of a litigating party to the proceedings, expecting a correct treatment, impartial with equal opportunities to exhaust legal remedies, despite of personal or legal status, that he or she has as a litigating party.

37. In this respect, the Court, taking into account the Applicant's allegation of violation of this fundamental right and the abovementioned considerations, considers that none of the conditions required by Article 24 of the Constitution have been met to ascertain that the regular courts treated the Applicant in an unequal and discriminatory manner. The Applicant failed to prove his allegation by any evidence, and to further argue how and why the regular courts in his case tried to achieve an illegitimate aim to treat him unequally in relation to another party, namely KEK (see: the Resolution on Inadmissibility of the Constitutional Court in Case KI82/16 with Applicant *Đeljalj Kazagić*, of 1 March 2017, from paragraph 28 to paragraph 31).
38. Regarding the allegations of violation of Article 31 of the Constitution, in conjunction with Article 6.1 of the Convention, the Court considers that the Applicant has not provided any *prima facie* evidence that would find that the regular courts violated his right to "fair trial". The Court further notes that the Applicant's allegations of violation of this constitutional right relate to the manner how the regular courts administered the evidence adduced before them, how they determined the factual situation, and how they interpreted and applied the substantive and procedural law in the Applicant's case. Therefore, as such, the Court assesses that these allegations raise issues of legality, which are dealt with by the regular courts according to the competences given to them by the Constitution.
39. Regarding the Applicant's allegation that he was convicted without a court decision and based on non-established guilt, the Court notes that the termination of the employment relationship of the Applicant is related to the violation of duties and responsibilities at work, which were foreseen by the Law on Labor and KEK sub-legal act. It is not the domain of the Court to assess whether the regular courts interpreted correctly the substantive law and the sub-legal act of KEK, or whether it was necessary to conduct a special procedure in the case of the Applicant that would prove his guilt or innocence.
40. In addition, the Court notes that the Supreme Court in its reasoning explained: *"In fact, the claimant has not substantiated his allegations regarding the nonexistence of his liability before the Disciplinary Committee and in the proceedings conducted before the first instance court, thus the claimant failed to provide facts to substantiate his allegations that the employment contract was terminated in contradiction to the law"*.
41. The Supreme Court further reasoned: *"...based on minutes No. 547 of the Disciplinary Committee, dated 26.03.2013, and Internal Audit Report No. 977 of the respondent, of 25.02.2011, the fact that the claimant has committed violation of work duties under Article 7, paragraph 7.1, sub-paragraph f) of the KEK Disciplinary Code (No. 454, dated 04.10.2010), negligent actions in the performance of his duties that cause property damage to the respondent, is confirmed undoubtedly, therefore, the disciplinary measure has been*

*imposed in conformity with the provision of Article 70.4.1, 86 of the Law on Labour and Article 10.19 and 10.21 of the KEK Disciplinary Code”.*

42. Finally, the Supreme Court concluded: “*The allegations in the revision for essential violation of the provisions of contested procedure under Article 182, paragraph 2, item (n) of the LCP, cannot be accepted as grounded, because the challenged Judgments do not contain flaws which would make these Judgments unlawful, since their enacting clause and reasoning is comprehensible and substantiated on evidence accepted also by this court of revision”.*
43. The Court also notes that the Applicant alleges a violation of Articles 49, 53 and 55 of the Constitution, always because the Supreme Court erroneously interpreted the provisions of the substantive law (Law on Labor), to his detriment.
44. Regarding these allegations, the Court reiterates that it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See *mutatis mutandis Garcia Ruiz vs. Spain* [GC], No. 30544/96, para. 28, European Court of Human Rights [ECtHR], 1999-1). The role of the Constitutional Court is to assess whether the proceedings before the regular courts were correct and fair in entirety, including the way the evidence was taken (See case *Edwards v. United Kingdom*, No. 13071/87, Report of European Commission on Human Rights, of 10 July 1991).
45. In fact, the Court notes that the Applicant merely disagrees with the outcome of the case; however the disagreement cannot serve him as a right to raise an arguable claim on the violation of the provisions of the Constitution, as he claims in his allegations (See Resolution on Inadmissibility of the Constitutional Court, in case No. KI12S/11, Applicant *Shaban Gojnovci*, of 28 May 2012, paragraph 28).
46. The Court reiterates that it is not its task to deal with errors of fact or the 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 the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, European Court on Human Rights case *Garcia Ruiz v. Spain*, no. 30544/96, Judgment of 21 January 1999, para. 28).
47. The role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments, therefore, it 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).
48. Viewing the proceedings in entirety, the Court considers that the lower instance courts and the Supreme Court, in their decisions provided a detailed

and complete description of their findings, giving numerous reasons in response to the Applicant's allegations.

49. In addition, the Court considers that the court proceeding conducted before the regular courts, namely the Supreme Court, was not in any way unfair or arbitrary (see, *mutatis mutandis*, *Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).
50. In conclusion, the Court finds that the evidence submitted by the Applicant does not provide *prima facie* evidence that the rights protected by the Constitution have been violated. In addition, the Applicant failed to substantiate his allegations of a violation of Articles 24, 49, 31, 53 and 55 of the Constitution and Article 6.1 of the Convention, in particular the right to fair and impartial trial.
51. Therefore, the Applicant's Referral, on constitutional basis, is to be declared inadmissible, in accordance with Article 48 of the Law and Rule 36 (2) (b) and (d) of the Rules of Procedure.

### FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 48 of the Law and Rules 36 (1) (d) and (2) (b), and 56 (2) of the Rules of Procedure, on 20 April 2018, unanimously

### DECIDES

- I. TO DECLARE the Referral inadmissible;
- 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;
- IV. This Decision is effective immediately.

**Judge Rapporteur**

Altay Suroy



**President of the Constitutional Court**

Arta Rama-Hajrizi