



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

Prishtina, on 5 February 2018  
Ref.no: RK 1192/18

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI152/17**

Applicant

**Shaqir Totaj**

**Constitutional review of Judgment of the Supreme Court of the Republic  
of Kosovo, A.A. U.ZH. No. 63/2017, of 7 December 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

#### **The Applicant**

1. The Referral was submitted by Mr. Shaqir Totaj from Prizren (hereinafter: the Applicant).

## **Challenged decision**

2. The Applicant challenges the Judgment of the Supreme Court of the Republic of Kosovo A.A. U.ZH. No. 63/2017, of 7 December 2017.

## **Subject matter**

3. The subject matter is the constitutional review of the abovementioned Judgment, which allegedly violated the Applicant's rights guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as the Article 3 [General Principles] of the Law No. 03/L-072 on Local Elections of the Republic of Kosovo (hereinafter: the Law on Local Elections).
4. The Applicant requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) *"to impose as interim measure the suspension of the work of the elected Mayor of the Municipality of Prizren, pending the final Decision of the Constitutional Court"*.

## **Legal basis**

5. The Referral is based on Article 113.7 of the Constitution, Articles 27 and 47 of the Law, No. 03/L-121, on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), as well as Rules 29 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Procedures before the Constitutional Court**

6. On 15 December 2017, the Applicant submitted the Referral to the Court.
7. On the same day, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of judges: Almiro Rodrigues (presiding), Snezhana Botusharova and Selvete Gërxhaliu Krasniqi.
8. On 19 December 2017, the Court notified the Applicant on the registration of the Referral and requested from him that within seven (7) days from the receipt of the notification letter, to clarify whether he submitted the Referral as an individual Referral on his behalf. Also, the Court sent a copy of the Referral to the Supreme Court.
9. On the same day, the Court notified the Democratic Party of Kosovo (hereinafter: the PDK), as well as Mr. Mytaher Haskuka, candidate of the VETËVENDOSJE! Movement for the Mayor of the Municipality in Prizren, in local elections for the year 2017 (in their capacity as interested parties), on registration of the Referral. The Court sent them copies of the Referral and invited them, within seven (7) days from the receipt of the notification, to submit their eventual comments regarding the Referral.
10. On 26 December 2017, within the provided deadline, the Applicant submitted to the Court the requested clarification.



11. On the same day, Mr. Mytaher Haskuka submitted his comments via electronic mail. Within the provided deadline, the PDK did not submit any comment.
12. On 29 December 2017, the Court notified the Applicant, Mr. Mytaher Haskuka and the PDK, on the received clarification and the respective comments (as well as sent to them copies of the clarification and the comments).
13. On 17 January 2018, after having considered the preliminary report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of Referral.

### Summary of facts

14. On 22 October 2017 the first round of local elections in the Republic of Kosovo was held. The Applicant was the candidate of PDK for the Mayor of the Municipality in Prizren.
15. The final results of the first round of elections determined that the outcome for the Mayor of the Municipality of Prizren will be decided by the result of the second round of elections (run-offs), which would take place between the two most voted candidates in the first round, namely the Applicant, Mr. Shaqir Totaj of PDK and Mr. Mytaher Haskuka of VETËVENDOSJE Movement!
16. On 19 November 2017 the second round of local elections was held, where the two abovementioned candidates competed for the Mayor of the Municipality of Prizren.
17. On 29 November 2017, the Central Election Commission announced the final results of the second round of elections for the Mayor of the Municipality of Prizren. According to these results, the Applicant, Mr. Shaqir Totaj, had received 49.64% of the votes; whereas, Mr. Mytaher Haskuka had received 50.36% of the votes.
18. On 30 November 2017, the PDK, through its representative, Mr. Gani Koci, filed an appeal with the Election Complaints and Appeals Panel (hereinafter: ECAP), requesting *“to investigate, count the ballots and other election materials, and after establishing the facts regarding the violation of the electoral process on the voting day, to annul the election result and order the Central Election Commission to repeat the ballots in the Municipality of Prizren”*.
19. On 1 December 2017, the ECAP, by Decision ZL. ANR. 1124/2017, rejected the appeal of the PDK as unlawful, with the following reasoning:

*“The appeal submitted by the political subject Partia Demokratike e Kosovës [...] the Panel treated and proceeded in this stage of the election process as an appeal, within the meaning of the legal provisions of Article 3, paragraph 8, Rule no. 02/2015, of Rules and Procedures of ECAP. [...] After the review of the admissibility of the appeal, pursuant to Article 117, of the LGE, ECAP found that the allegations of the appellant in this stage of the election process are inadmissible due to the following reasons:*



*As defined by LGE and Election Rules, each stage of the elections process has definite legal time limits for submitting complaints and appeals at ECAP, that are related to the stage of the election process that is being conducted. In the present case, we are now in the stage of the election process, after the publication of the final results of local elections for the second round held on 19 November 2017 for mayors of the municipalities.*

*The Panel assesses that this stage of the election process can be appealed only regarding the Decision of CEC [Central Election Commission] after the declaration of the final results for mayor of the municipalities and that for the irregularities caused during the administration of data at C&RC, the discrepancies of RRF, CRF and evidence that are eventually brought by the party that has legal interest, evidence which do not comply with the final result of elections, or the irregularities which were publicly known and have been considered by the Panel that they may have direct influence in the final result and that mine the election process, but that have not been improved, namely have not been eliminated by CEC [...].*

*The appealed allegations of the appellant [...] for the second round of local elections held on 19 November 2017, [...] are assessed as inadmissible in this stage of the election process because all the irregularities related to the voting day, the time limit for submitting a complaint to the ECAP was 24 hours from the closure of polling centers, in this occasion the time limit was until 20 November 2017, at 19:00 hrs."*

20. On 5 December 2017, PDK filed an appeal with the Supreme Court challenging the lawfulness of the abovementioned Decision of ECAP, with the proposal that: the appeal is approved; the Decision of ECAP is annulled; that ECAP is requested to reconsider the decision or to annul the election results and order the CEC to repeat the ballots in the Municipality of Prizren.
21. On 7 December 2017, the Supreme Court, by Judgment AA. UZH. No.63/2017, rejected as ungrounded the appeal of the PDK with the following reasoning:

*"The appeal of the political subject Partia Demokratike e Kosoves (PDK) Branch in Prizren [...] was dismissed as inadmissible.*

*The Court assessed that the allegations of the political subject PDK, presented in its appeal against the challenged Decision of ECAP, are ungrounded. The Appellant [PDK] did not argue by any evidence its allegations, while the evidence that it revokes do not have an effect on issuance of another Decision upon this legal matter [...].*

*This Court also assesses all the irregularities that are related to the voting day, namely from 19 November 2017, the time limit for submitting a complaint to ECAP was 24 hours from the closure of Polling Centers, and within this meaning, pursuant to Article 119.1 of the LGE No. 03/L-73 amended and supplemented by Law No. 03/L-256, it is stipulated that the person that has legal interest in a matter within the jurisdiction of ECAP or the rights of whom have been violated regarding the election process regulated pursuant to this Law or election rules, may submit a complaint to ECAP within 24 hours from the moment of closure of the Polling Center and ECAP will decide upon the complaint within 72 hours from the time when the complaint was received.*



*ECAP correctly confirmed the irregularities during the election process, on the voting day for the second round of local elections of 19 November 2017, directly related to the voting day, and the time limit for submitting a complaint was 24 hours from the closure of polling centers, in this occasion the time limit was until 20 November 2017, at 19:00 hrs.*

*Therefore, this Court assesses that ECAP correctly decided when it dismissed the complaint of the political subject PDK as inadmissible since the time limit for filing complaints was 20 November 2017 until 19:00 hrs, while the complaint was submitted on 30 November 2017.*

*According to the assessment of the Court, the contested Decision is clear, understandable and it contains sufficient reasons regarding the decisive facts, which are also approved by this Court, which ascertained that also the substantive law was correctly applied. Based on the determined factual situation, this Court ascertained that in this legal matter the factual situation was correctly confirmed and the law was not violated to the detriment of the appellant, therefore it did not approve his allegations since they do not affect the determination of another factual situation from the one that was determined by ECAP”.*

22. On 11 December 2017, the Central Election Commission certified the final results of the second round for election of the Mayor of Prizren, as well as for some other municipalities.

#### **Clarification submitted by the Applicant**

23. Following the notification on the registration of the Referral, the Court requested the following clarification from the Applicant:

*“Through your Referral you are challenging the Judgment A.A. U.ZH. no. 63/2017 of the Supreme Court of Republic of Kosovo, of 7 December 2017, which was rendered following the appeal filed by the Democratic Party of Kosovo. [...] Please clarify if you have submitted the Referral to the Constitutional Court as an individual Referral on your behalf. [...]”*

24. In his response to the Court, the Applicant clarified as follows:

*“Following your notification for registration of Referral KI 152/17 and the request for clarification, I clarify that my Referral should be treated by the Constitutional Court as an individual Referral on my behalf.”*

#### **Comments submitted by the interested party, Mr. Mytaher Haskuka**

25. In his capacity as an interested party, Mr. Mytaher Haskuka has submitted comments regarding the admissibility of the Referral, the admissibility of the request on interim measure and merits of the Referral.
26. Regarding the admissibility of the Referral, in procedural aspect, Mr. Mytaher Haskuka claims that *“the applicant, by filing his referral with the Constitutional Court did not exhaust all legal remedies because “the PDK”, in capacity of a legal entity has used the appeals with ECAP and Supreme Court.”* Furthermore, Mr. Mytaher Haskuka states that that *“the PDK, in the capacity of a legal*



*person, represented by certain person, did not submit or signed the appeal or the submission on behalf of the Applicant (Shaqir Totaj) as determined by Article 118.4 and 119.1 of LGE nor in Constitutional Court”.*

27. Regarding the admissibility of the request for interim measure, Mr. Mytaher Haskuka states that: *“The applicant could not substantiate at any moment his request for interim measure with respective evidence or by presenting facts that would convince the Constitutional Court to undertake such a measure.”*
28. Regarding the merits of the Referral, Mr. Mytaher Haskuka states that: *“[...] the ECAC and Supreme Court have correctly and fairly decided when they have dismissed the appeal filed by the PDK political party as inadmissible and ungrounded.”* Further he states that: *“[...] the lack of compliance with deadline and lack of substantiation of allegations with respective evidence does not reflect violation of Article 45 of the Constitution, specifically the passive right to be elected.”*

### **Applicant’s allegations**

29. The Applicant alleges a violation of Article 45 [Freedom of Election and Participation] of the Constitution and Article 3 [General Principles] of the Law on Local Elections.
30. In this regard, the Applicant alleges that the Supreme Court failed to *“prove and verify the facts and evidence of the appellant, which are related and implicate directly the legal interest of its applicant and they are decisive in considering the violation or non-violation of the constitutional right, the passive election right (the right to be elected) [...]”*.
31. Further, the Applicant states that, by not reviewing the appeal, the ECAP *“[...] has avoided decisive facts and evidence”*. According to the Applicant *“despite the fact that PDK filed a complaint that was based on the facts and evidence connected to the election process and counting [...] the Decision on dismissing the complaint of PDK as inadmissible, was grounded by ECAP on the fact of the failure to submit the complaint within 24 hours from the closure of counting centers, by not reviewing this complaints based on merit even though a considerable piece of evidence and its facts we exclusively related to the process of counting conditional ballots, postal ballots and ballots of persons with specific needs, a process which happened after the declaration of preliminary results by CEC”*.
32. Moreover, the Applicant alleges that ECAP *“erroneously applied Article 119.1 of Law No. 03/L-073 on General Elections in the Republic of Kosovo, amended and supplemented by Law No. 03/L-256”* as it had *“by considering each fact or evidence, which confirms the violations pursuant to this law, irrelevant and ineffective, even after the ballot day [...]”*. According to the Applicant *“those violations result or may result in the violation of the basic election principles and the constitutional and legal passive election right (the right to be elected).”*
33. The Applicant requests from the Court: *“review of the constitutionality and legality of the Judgment A.A. U.ZH. No.63 / 2017 of the Supreme Court of*

*Kosovo of 07.12.2017, by which, the appeal A. ZL. No. 1124/2017, of 1 December 2017, submitted by the political party Partia Demokratike e Kosoves "PDK", against the Decision of the Election Complaints and Appeals Panel "ECAP", due to the misuses during the election process, on the voting day for the second round of local elections of 19 December 2017, was rejected as ungrounded [...]."*

34. The Applicant also requests from the Court "to impose as interim measure the suspension of the work of the elected Mayor of the Municipality of Prizren, pending the final Decision of the Constitutional Court."

**Relevant legal provisions of Law No. L-073 on General Elections in the Republic of Kosovo as amended by Law No. -3-L-256 on amending and supplementing the Law No. 03/L-073 on General Elections in the Republic of Kosovo.**

*Article 118 [Decisions]*

118.1

*The ECAC shall accept a complaint that is well-grounded and dismiss a complaint that does not meet this standard. [...]*

118.4

*An appeal may be made from a decision of the ECAP, as ECAP may reconsider any of its decisions upon the presentation by an interested party. An appeal to the Supreme Court of Kosovo may be made within twenty four (24) hours of the decision by ECAP, if the fine involved is higher than five thousand Euro (€5,000) or if the matter affects a fundamental right. The Supreme Court shall decide within seventy two (72) hours after the appeal is filed.*

*Article 119 [Complaints]*

*119.1 A person who has a legal interest in a matter within the jurisdiction of ECAP, or whose rights concerning the electoral process as established by this law or electoral rule have been violated, may submit a complaint to the ECAP within twenty four (24) hours after the close of the polling stations and the ECAP shall decide the complaint within seventy two (72) hours after the complaint is received.*

**Assessment of the admissibility of Referral**

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

37. The Court also refers to Article 47 [Individual Referrals] of the Law which provides:

*1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*

*2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.*

38. In addition, the Court refers to paragraph (1) (b) of Rule 36 [Admissibility Criteria] of the Rules of Procedures which foresees:

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

*[...]*

*(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.*

39. The Court recalls that the Referral was submitted as individual Referral by Mr. Shaqir Totaj who requests the constitutional review of the Judgment A.A. U.ZH. No. 63/2017 of the Supreme Court, of 7 December 2017. This Judgment was rendered by the Supreme Court following the appeal that PDK, in its capacity as a political entity and thus as a legal person, filed against the Decision Anr. 1124/2017 of ECAP, of 1 December 2017.

40. The fact that the Applicant submitted his constitutional referral in the capacity of a natural person and on his personal behalf is confirmed by his own clarification submitted to the Court. This clarification was submitted by the Applicant upon the Court's request addressed to him. In his reply, the Applicant stated that "*my Referral should be treated by the Constitutional Court as an individual Referral on my behalf.*"

41. The court also notes that in the Referral submitted to the Court, the Applicant stated that "*there were no other regular legal remedies that we have not used*", hinting at the legal remedies exhausted by the PDK, as a single procedural party before ECAP and the Supreme Court.

42. However, from the case file, the Court finds that the Applicant has not exhausted any legal remedy in his behalf, as a natural person or as "person who has legal interest", with ECAP or with Supreme Court, before filing the current Referral before the Constitutional Court. Moreover, the Court notes that the Applicant is never mentioned in the challenged Judgment nor in the abovementioned Decision of ECAP.

43. In this regard, the Court recalls that the Applicant had the legal opportunity as a natural person or as a "person who has legal interest" to file respective complaints regarding his allegations on "*violation of passive election right (the*



*right to be elected*)". He could have submitted allegations of violation of his constitutional rights before ECAP and the Supreme Court in accordance with the applicable laws. Only after exhaustion of such remedies he would have been able to submit before the Constitutional Court an individual Referral for constitutional review of the above mentioned decisions of the ECAP and the Supreme Court, in accordance with Article 113.7 of the Constitution and Article 47 of the Law.

44. In the light of the facts referred to above, the Court concludes that the Applicant did not exhaust the legal remedies available to him, provided by the applicable laws in the Republic of Kosovo (see *Constitutional Court case KI73 / 09 , Mimoza Kusari-Lila v. the Central Election Commission*, Resolution on Inadmissibility, of 24 March 2010, §§ 28-36).
45. The Court recalls that the rationale for the exhaustion of the legal remedies is a reflection of the principle of subsidiarity as a fundamental principle in the constitutional judiciary, aiming to afford regular courts or relevant public authorities with the opportunity to prevent or remedy the alleged violation of the Constitution (See Constitutional Court case KI41/09, *AAB-RIINVEST University L.L.C. Prishtina v. the Government of the Republic of Kosovo*, Resolution on Inadmissibility, of 21 January 2010, § 16; and ECtHR case *Selmouni vs. France*, Application No. 25803/94, Judgment of 28 July 1999, § 74).
46. In conclusion, the Court finds that the Referral has been filed before the Applicant exhausted all legal remedies and as such is to be declared inadmissible pursuant to Article 113.1 of the Constitution, Article 47 of the Law and Rule 36 (1) (a) of Rules of Procedure.

#### **The request for an interim measure**

47. The Court recalls that the Applicant also requests from the Court "*to impose as interim measure the suspension of the work of the elected Mayor of the Municipality of Prizren, waiting the final Decision of the Constitutional Court.*"
48. In support of this request, the Applicant states that "*the interim measure is to the interest of the public because the lack of it causes an irreparable damage in the functioning of the institution - Municipality of Prizren and the democracy of the Republic of Kosovo.*"
49. The Court recalls it's finding that the Applicant's Referral was declared inadmissible because he did not exhaust all legal remedies.
50. Therefore, in accordance with the aforementioned findings and pursuant to Article 116 (2) of the Constitution, Article 27 (1) of the Law and Rule 55 (4) of the Rules of Procedure the request for the interim measure is rejected as unfounded.

## **FOR THESE REASONS**

In accordance with Article 113 (7) of the Constitution, Article 49 of the Law and Rule 36 (1) (b) of the Rules of Procedure, in its session held on 17 January 2018, the Constitutional Court unanimously

## **DECIDES**

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the request for interim measures;
- 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**



Bekim Sejdiu



**President of the Constitutional Court**



Arta Rama-Hajrizi