



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

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Prishtina, on 07 October 2019  
Ref. no.:RK 1439/19

*This translation is unofficial and serves for informational purposes only.*

## **RESOLUTION ON INADMISSIBILITY**

in

**Case no. KI10/19**

Applicant

**Besarta Maloku**

**Constitutional review of Judgment Rev. No. 326/18 of the Supreme Court  
of 9 November 2018**

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

composed of:

Arta Rama-Hajrizi, President  
Bajram Ljatifi, Deputy President  
Bekim Sejdiu, Judge  
Selvete Gërxhaliu-Krasniqi, Judge  
Gresa Caka-Nimani, Judge  
Safet Hoxha, Judge  
Radomir Laban, Judge  
Remzije Istrefi-Peci, Judge, and  
Nexhmi Rexhepi, Judge

#### **Applicant**

1. The Referral was submitted by Besarta Maloku (hereinafter: the Applicant), who is represented by Ruzhdi Maloku, a lawyer from Vushtrri.

## **Challenged decision**

2. The Applicant challenges the constitutionality of Judgment Rev. No. 326/18 of the Supreme Court of 9 November 2018 (hereinafter: the challenged Judgment), which was served on her on 20 November 2018.

## **Subject matter**

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly violated the Applicant's rights guaranteed by Articles: 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 [Right to a fair trial], of the European Convention on Human Rights (hereinafter: the Convention).

## **Legal basis**

4. The Referral is based on paragraphs 1 and 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 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Proceedings before the Constitutional Court**

5. On 15 January 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 28 January 2019, the President of the Court appointed Judge Selvete Gerxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).
7. On 15 February 2019, the Court notified the Applicant about the registration of Referral KI10/19 and sent a copy of it to the Supreme Court, in accordance with the law.
8. On 10 September 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

## **Summary of facts**

### *Administrative procedure*

9. On 14 November 2016, the Kosovo Academy of Public Safety (hereinafter: KAPS), announced a job vacancy for the position of a general practitioner.

10. On 21 December 2016, KAPS announced the list of successful candidates and according to the evaluation of the commission the Applicant was listed as the second most successful candidate, with a total of 77% of the collected points.
11. On 30 December 2016, the Applicant filed a complaint with the Dispute and Complaints Resolution Commission (hereinafter: the DCRC) against the decision of the KAPS Commission on the announcement of results.
12. On 30 January 2017, the DCRC by Decision No. 01/2017 rejected as ungrounded the Applicant's appeal.
13. On 10 February 2017, the Applicant filed an appeal with the Labor Inspectorate, alleging breach of procedures by the KAPS regarding the establishment of an employment relationship, pursuant to the Law on Labor and applicable sub-legal acts.
14. On 21 February 2017, the Labor Inspectorate by Decision No. XVII-29, approves the Applicant's request and orders KAPS to annul KAPS Decision No. 05/2016, namely of the Selection Committee, of 21 December 2016 and Decision No. 01/2017 of the DCRC of 30 January 2017, because it was not acted in accordance with Article 4, paragraphs (3 and 4) of Administrative Instruction No. 14/2011, on regulating procedure for establishment of employment in the public sector.
15. On 23 February 2017, KAPS filed a complaint with the Executive Body of the Ministry of Labor and Social Welfare against the Decision of 21 February 2017 of the Labor Inspectorate, due to incomplete determination of the factual situation and erroneous application of the substantive law.
16. On an unspecified date, the Executive Body of the Ministry of Labor and Social Welfare issues a decision repealing Decision No. XVII-29 of the first instance body, remanding the case for reconsideration on the ground that the substantive law was erroneously applied.
17. On 14 March 2017, the Labor Inspectorate, on the basis of the recommendations of the second instance body, again issues a decision, and finally rejects the Applicant's appeal.

#### *Court proceedings*

18. On 20 February 2017, the Applicant filed a statement of claim requesting the annulment, as unlawful, of the KAPS vacancy No. 5/2016, namely the decision of the commission on announcement of results of the candidates.
19. On 9 June 2017, the Basic Court in Mitrovica, branch in Vushtrri, by Judgment C. No. 75/2017, approved the Applicant's statement of claim; annulled the KAPS vacancy No. 5/2016 of 14 November 2016; obliged KAPS to re-announce the vacancy within 7 days the Judgment becomes final and ordered the latter to take into account the professional training of the members of the selection committee when selecting the candidates.

20. On an unspecified date, the KAPS filed appeal with the Court of Appeals on the grounds of alleged violations of substantive and procedural law.
21. On 13 June 2018, the Court of Appeals of Kosovo, by Judgment AC. No. 3049/2017, rejected, as ungrounded, the KAPS appeal and upheld the judgment of the District Court of 9 June 2017 in its entirety.
22. KAPS, within the legal deadline, filed a request for revision with the Supreme Court, on the grounds of essential violations of the provisions of contested procedure and erroneous application of substantive law, with the proposal that the two judgments of lower instance courts be modified and the statement of claim of the claimant be rejected as ungrounded.
23. On 9 November 2018, the Supreme Court, by Judgment Rev. 326/2018, approved the request for revision filed by the KAPS and modified the decisions of the lower instance courts, thus rejecting the Applicant's statement of claim on the grounds that the lower instance courts have erroneously applied the substantive law.

### **Applicant's allegations**

24. The Applicant alleges that the challenged Judgment of the Supreme Court violates her rights guaranteed by Articles: 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial] and 53 [Interpretation of Human Rights Provisions] of the Constitution.
25. The Applicant also alleges that the Supreme Court in its decision violated Article 31 of the Constitution and Article 6 of the Convention on the grounds that: *“Administrative Instruction no. 14/2011 regulating procedures for establishment of employment in the public sector in Article 4. 4 provided: “At least three members of the Commission must be in a higher position than the position is selected, the other two members can be in the position”. The Supreme Court of Kosovo has erroneously interpreted this administrative instruction because the meaning of this provision is clear and understandable: three members must be in a higher position than the position selected. In the present case the position that is selected was the General Practitioner, while three members of the committee were required to be in higher positions, which means medical specialists, while two other members of the committee may be in equal positions with the position selected, which means to be a General Practitioner, because in this form the most deserving and professional candidate will be selected.”*
26. Furthermore, the Applicant alleges that: *“The position of the Supreme Court of Kosovo is contrary to the abovementioned instruction as well as contrary to the general social interest, because according to it the Doctor may be interviewed by either a public relations officer or an officer of the training division, who has no basic knowledge in the field of medicine and how such recruitment is allowed is irritating”.*

27. Finally, the Applicant requests the Court to assess the constitutionality of the challenged Judgment Rev. No. 326/18 of the Supreme Court and “...to quash the same judgment and remand the case for retrial and reconsideration”.

### **Admissibility of the Referral**

28. The Court first examines whether the admissibility requirements established in the Constitution, further specified in the Law and the Rules of Procedure have been met.

29. 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.”*

[...]

30. The Court also refers to Articles: 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47  
[Individual Requests]

[...]

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

Article 48  
[Accuracy of the Referral]

*“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.”*

Article 49  
[Deadlines]

*“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...”*

31. As regards the fulfillment of these requirements, the Court finds that the Applicant is an authorized party; has exhausted available legal remedies; has specified the act of public authority which she challenges before the Court and has also clarified the constitutional rights and freedoms which she claims to

have been violated by the challenged act in accordance with Article 48 of the Law and submitted the referral on time, pursuant to Article 49 of the Law.

32. In addition, the Court should also examine whether the Applicant has met the admissibility requirements specified in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure sets out the criteria on the basis of which the Court may consider the Referral, including the criterion that the Referral is not manifestly ill-founded. Specifically, Rule 39 (2) states that:

*“(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim”.*

33. The Court recalls that the Applicant alleges that the challenged Judgment violates her rights guaranteed by Articles: 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of the Human Rights Provisions] of the Constitution, and by Article 6 [Right to a fair trial] of the Convention.
34. The Court notes that the Applicant only mentions allegations of violations of Articles 22 and 53 of the Constitution in her Referral, but she does not elaborate further on how and why these specific provisions have been violated.
35. The allegations of violation of Article 31 of the Constitution, in conjunction with Article 6 of the Convention, the Applicant relates to the manner the Supreme Court interpreted the provisions of Administrative Instruction No. 14/2011 regulating procedures for establishment of employment in the public sector and according to her, the position of the Supreme Court is contrary to the abovementioned instruction and contrary to the general social interest.
36. In this respect, the Court refers to the relevant parts of the challenged Judgment and notes that the Supreme Court reasoned its conclusion, as follows: *“...By Administrative Instruction No. 14/2011 Regulating the Procedures for the Establishment of Employment in the Public Sector, Article 4 (4) provides: “At least three members of the Commission must be in a higher position than the position is selected, the other two members can be in the position” from which provision it follows that the composition of the Commission refers to the position of non-occupation, while in the present case, in the composition of the Commission of the respondent was the Director of the Department of Finance and General Services, another member was the Director of Medical Services in the Kosovo Police (intern and endocrinology specialist), Head of Legal Affairs Division, Head of Training Division and Senior Public Communications Officer, from this composition of the commission it follows that the respondent has correctly applied the provisions of Article 4, paragraph 4, of the Administrative Instruction mentioned above.”*
37. The Court considers that the Applicant’s allegations relate to the way the Supreme Court in her case interpreted the relevant legal and sublegal provisions, therefore, the Court considers that the same raise, in fact, questions

of law (legality) which fall within the domain of regular courts and not of the Constitutional Court.

38. The Court reiterates that it is not its task to deal with errors of fact 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 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*, Judgment of the European Court of Human Rights (hereinafter: the ECtHR) of 21 January 1999, *Garcia Ruiz v. Spain*, no. 30544/96, paragraph 28).
39. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as “a fourth-instance court” (see, *mutatis mutandis*, case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
40. The Court notes that the Applicant merely does not agree with the outcome of the proceedings. However, his dissatisfaction with the outcome of the proceedings completed before the regular courts cannot of itself raise an arguable claim of violation of the right to fair and impartial trial (see, *mutatis mutandis*, case *Mezotur – Tiszazugi Tarsulat v. Hungary*, ECtHR, Judgment of 26 July 2005, paragraph 21; see also case KI56/17, Applicant *Lumturije Murtezaj*, Resolution of Inadmissibility of 18 December 2017, paragraph 42).
41. As a result, the Court considers that the Applicant, on constitutional basis, did not substantiate her allegations that the relevant proceedings were in any way unfair or arbitrary and that the challenged Judgment violated her rights and freedoms guaranteed by the Constitution and Convention. (See, *mutatis mutandis*, *Shub v. Lithuania*, no. 17064/06, ECtHR, Decision of 30 June 2009).
42. In conclusion, in accordance with Rule 39 (2) of the Rules of Procedure the Referral is manifestly ill-founded on constitutional basis and therefore inadmissible.

## **FOR THESE REASONS**

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rules 39 (2) and 59 (b) of the Rules of Procedure, on 10 September 2019, 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**

**President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi

Arta Rama-Hajrizi



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