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

Prishtina, on 3 January 2020
Ref. no.:RK 1494/20

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

# RESOLUTION ON INADMISSIBILITY

in

**Case No. KI28/19**

Applicant

**Lutfi Morina**

**Constitutional review of Decision Ac. No. 4035/18 of the Court of Appeals of 5 October 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 Lutfi Morina from Klina (hereinafter: the Applicant).

## Challenged decision

2. The Applicant challenges the constitutionality of the Decision [Ac. No. 4035/18] of the Court of Appeals of Kosovo of 5 October 2018 in conjunction with Decision [C. No. 305/18] of the Basic Court in Peja - Branch Klina of 22 August 2018.

3. The challenged decision of the Court of Appeals of Kosovo [Ac. No. 4035/18] of 5 October 2018, was served on the Applicant on 22 October 2018.

## Subject matter

4. The subject matter is the constitutional review of the challenged Decision which allegedly violates the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

## Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 20, 47 and 48 of 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

6. On 8 February 2019, the Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 15 February 2019, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu Krasniqi and Gresa Caka-Nimani.

8. On 19 April 2019, the Court notified the Applicant about the registration of the Referral and requested him to complete the referral form in accordance with Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure. On the same date, a copy of the Referral was sent to the Court of Appeals.

9. On 7 May 2019, the Applicant submitted the completed referral form in accordance with Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure.

10. On 27 November 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

11. It follows from the documents contained in the Referral that the Applicant had disagreements with his wife that were finally addressed to the regular courts of the Republic of Kosovo.

12. On an unspecified date, the Applicant's spouse AM, based on the Law on Protection Against Domestic Violence (LPDV), requested the Basic Court in Peja - Branch Klina to issue a protection order against the Applicant with an allegation for protection from physical and psychological violence.

13. On 22 August 2018, the Basic Court in Peja - Branch in Klina (Decision C. No. 305/18) partially upheld the request of AM and, *inter alia*, determined: (i) it is forbidden to the Applicant to approach the protected party AM; (ii) that the Applicant is required to pay an alimony of 150 euro per month for the custody of minor children; (iii) to order the Applicant to enable the protected party AM to take personal belongings under the escort of police officers; (iv) the duration of the protection order is 6 months from the date of its issuance; and (v) failure to comply with a protection order constitutes a criminal offense.

14. After hearing the witnesses and assessing the evidence, the Basic Court in Peja - Branch in Klina found that the Applicant against the protected party AM for thirteen (13) years caused physical and psychological violence that was also characterized by threats that AM would be shot with a gun, which in the end, resulted in the factual separation of the marital community and shelter of the protected party AM together with the children at her parents' house.

15. The Basic Court in Peja - Branch in Klina after hearing the litigating parties, the representative for victim protection, representatives of the Klina Center for Social Work and the witnesses RZ, ZK, EM and FM determined the factual situation which indicates the deterioration of marital relationship of the litigating parties as a result of the "low jealousy" that the Applicant had towards AM restricting her "to go out of the apartment" and "free movement" for more than thirteen (13) years.

16. The Basic Court in Peja - Branch Klina also rejected the request of the protected party for the temporary deprivation of the Applicant's parental right because it was not established that he abused his parental right; however, it also added that the protection order should be understood as a prevention measure and warning with regard to the legal consequences for the Applicant if he repeats his conduct.

17. On 29 August 2018, the Applicant filed an appeal with the Court of Appeals challenging the aforementioned decision of the Basic Court alleging violation of the provisions of contested procedure, violation of the Convention on the Rights of the Child and erroneous application of the substantive law with a proposal that the challenged decision be modified or quashed and the case be remanded to the first instance court for reconsideration and that the request of the protected party AM be rejected as ungrounded.

18. In the appeal before the Court of Appeals, the Applicant alleged that the minor EL was questioned in the capacity of a witness unlawfully by the first instance court because at the hearing on 22 August 2018 she had not yet turned fourteen (14), which is in violation of Article 128 of the Criminal Procedure Code, the Constitution, the Convention on the Rights of the Child and the ECHR. The Applicant alleged that Article 128 of the Criminal Procedure Code prohibits the questioning of children under the age of 14; and the fact that the law on the contested procedure does not provide for the prohibition of juvenile witnesses indicates that the challenged decision is unlawful because it is based on inadmissible evidence under the Convention on the Rights of the Child and the ECHR.

19. On 5 October 2018, the Court of Appeals (Decision Ac. No. 4035/18) rejected as ungrounded the Applicant's appeal and upheld Decision C. No. 305/18 of the Basic Court in Peja, of 22 August 2018. The Court of Appeals reasoned: (i) that the Decision of the Basic Court is fair and lawful because it is not characterized by essential violation of the contested procedure; (ii) that the challenged decision pursues the LPDV goal of preventing domestic violence in all its forms, and that (iii) the challenged decision has succeeded in providing and offering adequate protection to the protected party and children, as foreseen by the Convention for the Protection of the Rights of the Child.

20. The relevant part of the abovementioned judgment of the Court of Appeals reads:

> *"The Court of Appeals considers that in the present case the first instance court has rightly decided when it rendered the appealed decision, as such a decision is in full accordance with the factual situation, and since the court during the proceedings, namely the hearing heard the litigating parties in the capacity of the parties, the testimonies of witnesses, on the basis of which evidence showed that the respondent exercised psychic violence against the protected party expressing jealousy towards the protected party and thereby restricted and prohibited her free movement, namely going out of the apartment and free movement, which he was continuously doing for the past 13 years, from which the protected party was forced to leave her home, where, the continuous deterioration of relations between the litigating parties was testified by the witnesses heard at the hearing, therefore the first instance court, in the reasoning of the decision, gave sufficiently convincing reasons for all the decisive facts which were taken into consideration by the first instance court, according to which it was decided on the grounds of the request* [...] *Regarding the manner of deciding as in items 4 and 5 of part II (second) of the enacting clause of the challenged decision, which concerns the custody, entrustment of the child and contact with the responsible party, the court of first instance has decided having regard to the opinion of the Center for Social Work, which has decided that the minor children EM, AM and JM should be temporarily entrusted to the protected party AM because it is in the best interests of the minor children to have an emotional connection with the mother, the specific care needs that the mother provides to the child, in particular taking into account the fact that minor children are of a young age where maternal care is necessary for the upbringing and care of*

*children, and has therefore considered that it is in the best interest of the children, having regard to the emotional state of the children, their age, and the court has decided as in the enacting clause of this decision".*

**Applicant's allegations**

21. The Applicant alleges that the Decision [Ac. No. 4035/18] of the Court of Appeals of 5 October 2018 and the Decision [C. No. 305/18] of the Basic Court in Peja-Branch in Klina of 22 August 2018 violate his right to fair and impartial trial guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 [Right to a fair trial] of the ECHR.

22. The Applicant alleges: *"[...] The Court of Appeals did not reason the challenged decision with respect to the Applicant's substantive allegations filed in the appeal of 29 August 2018 which was filed against Decision C. No. 305/18 of the Basic Court in Peja-Branch Klina of 22.08.2018".*

23. With regard to the obligation of the courts to reason their decisions, the Applicant refers to the ECtHR decisions *Tatishvili v. Russia, Hadjianastassiou v. Greece* and the judgment of this Court in case no. KI97/16 with Applicant IKK Classic.

24. The Applicant alleges that Article 128 of the Criminal Procedure Code prohibits the questioning of children under the age of 14 and the fact that the law on contested procedure does not provide for prohibition of juvenile witnesses indicates that the regular court decisions are unlawful because they are based on inadmissible evidence under the Convention on the Rights of the Child and the ECHR.

25. The Applicant alleges that the Court of Appeals did not respond to the appealed allegations: (i) that the decision of the Basic Court in Peja - Branch Klina was unlawful because it was based on inadmissible evidence in violation of the Convention on the Rights of the Child and the ECHR; (ii) that the Decision of the Basic Court in Peja - Branch in Klina put the Applicant in an unequal position vis-à-vis the protected party AM because it did not administer the evidence favorable to the Applicant; and, (iii) unlawfully excluded the Applicant's lawyer from the hearing and failed to record the minutes of the hearing of 22 August 2018.

26. Finally, the Applicant requests the Court to: (i) declare his Referral admissible; (ii) to find that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; (iii) declare invalid Decision Ac. No. 4035/18 of the Court of Appeals of 5 October 2018 and, (iv) remand Decision Ac. No. 4035/18 of the Court of Appeals of 5 October 2018 for reconsideration.

**Relevant legal provisions**

LAW ON PROTECTION AGAINST DOMESTIC VIOLENCE No. 03/L-182

*Article 20 Modification, Termination and Extension of Protection Order*

*1. When the circumstances have changed, the protected party or the perpetrator may submit a petition to the court for the modification or termination of a protection order, where the court may decide that the protection order:*

*1.1. to remain in force;*

*1.2. to be modified;*

*1.3. to be terminated, where the Court assesses that all causes on basis of which the protection order was issued have ceased to exist.*

*2. The submission of a petition for the modification or termination of a protection order shall not suspend the execution of the protection order.*

*3. Within fifteen (15) days prior to the expiration of a protection order, the protected party or his/her authorized representative may submit a petition for the extension of the protection order. If no petition for extension is submitted, the protection order will terminate immediately on the day of expiration.*

*4. Upon receipt of a petition for the extension of a protection order, the court may:*

*4.1. terminate the protection order on its date of expiration; or*

*4.2. order the extension of the protection order, where the causes on basis of which the protection order was issued have ceased to exist.*

LAW ON CONTESTED PROCEDURE No. 03/L-006

*WITNESSES*
*Article 339*

*339.1 Everyone invited as a witness has to answer the call, if it is not determined differently by this law, and has to testify.*

*339.2 Only people that can give information on evidence can be asked to witness.*

***339.3 Minors below 14 can be called in as a witness only when it is necessary to solve the case.***

*FAMILY LAW OF KOSOVO No. 2004/32*

*Article 140. Court Decision on Exercise of Parental Rights and Obligations*

*[...]*

*(5) The opinion of the child who is capable of forming his/her views shall be taken into consideration by the court in all cases of parental custody. Such opinion shall be given due weight in accordance with the age and the ability of the child to understand.*

**Admissibility of the Referral**

27. 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.

28. 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".*

29. The Court further examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

*Article 47*
*[Individual Requests]*

*"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.*

*"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..."*

30. Regarding the fulfillment of these requirements, the Court considers that the Applicant is an authorized party, challenges an act of a public authority, namely Decision [Ac. No. 4035/18] of 5 October 2018 of the Court of Appeals, after exhaustion of all legal remedies provided by law. The Applicant also clarified the rights and freedoms he claims to have been violated in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

31. In addition, the Court should also examine whether the Applicant has met the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure establishes the criteria based on which the Court may consider a Referral including the criterion that the referral is not manifestly ill-founded. Rule 39 (2) of the Rules of Procedure specifies:

> *"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".*

32. In this respect, the Court notes that the Applicant alleges a violation of the right to a reasoned decision as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR by alleging that the regular courts: (i) have rendered decisions based on inadmissible evidence; (ii) have placed the Applicant on an unequal position with the responding party; and (iii) did not justify exclusion of the Applicant's lawyer from the hearing.

33. In addressing the Applicant's allegations, the Court notes that the substantive allegations concerning alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR have been interpreted in detail in the ECtHR case law, in accordance with which the Court pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Accordingly, in interpreting the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECtHR.

34. The Court notes that the case law of the ECtHR states that the fairness of a proceeding is assessed looking at the proceeding as a whole (See the ECtHR Judgment of 6 December 1988, *Barbera, Messeque and Jabardo v. Spain*, no. 10590/83, paragraph 68). Therefore, when assessing the Applicant's allegations, the Court will adhere to this principle (See also case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38; and case KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018, paragraph 31).

35. As to the allegation of admissibility of inadmissible evidence, the Court reiterates that the requirement of "*fairness*" as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR covers the proceedings as a whole, and the question whether a person has had a "*fair*" trial is looked at way by cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one stage may be put right at a later stage (see, for example: *Monnell and Morris v. the United Kingdom*, paragraphs 55-70).

36. As to the allegation that Article 128 of the CCK provides for the prohibition of questioning children under the age of 14 and that such prohibition is not provided for by the law of contested procedure, the Court reiterates that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (constitutionality). It may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "*fourth instance*", which would result in exceeding the limits set by its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (See, case *García Ruiz v. Spain*, ECtHR no. 30544/96 of 21 January 1999, paragraph 28; and see, also case KI70/11, Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).

37. In addition, the Constitution and the ECHR do not provide rules on evidence in the accurate sense of the word (see, *Mantovanelli v. France*, paragraph 34). The admissibility of evidence and the manner in which it is assessed are matters largely regulated by domestic law and regular courts (see, *Moreira de Azevedo v. Portugal*, paragraphs 83-84; and *García Ruiz v. Spain*, cited above, paragraph 28). However, the Court's duty under the Constitution and the ECHR is to establish whether the proceedings as a whole were fair, including the way in which the evidence was taken (see, *Elsholz v. Germany* [GC], paragraph 66; and *Devinar v. Slovenia*, paragraph 45). Therefore, it must be determined whether the evidence has been admitted in such a way as to guarantee a fair trial (see *Blücher v. Czech Republic*, paragraph 65).

38. In this respect, with regard to the testimony of juvenile EL, the Court notes that the regular courts have established the factual situation based on the testimony of many other witnesses (see paragraph 16 above). This shows that the testimony of the juvenile EL was not the only or main testimony that could have influenced the outcome of the case or the constitutionality of the process as a whole (see, *mutatis mutandis, Ruiz Torija v. Spain*, paragraph 30; and *Hiro Balani v. Spain*, paragraph 28).

39. In addition, the Court notes that the relevant provisions of the legal framework in the Republic of Kosovo allow the courts to question minors as well as they have the discretion to determine whether or not a minor will be questioned (see Article 339.3 of the Law on Contested Procedure No. 03/L-006 and Article 140.5 of the Family Law No. 2004/32). In this regard, the Court reiterates that it is not, as a general rule, its duty to substitute its own assessment of the facts

with that of the regular courts (see *mutatis mutandis Dombo and Beheer v. the Netherlands*, paragraph 31).

40. As to the allegation of non-justification of the exclusion of the lawyer from the hearing, the Court notes Article 31 of the Constitution in conjunction with Article 6 of the ECHR oblige the courts to give reasons for their decisions, but this obligation cannot be understood as a requirement to provide a detailed response to any argument (see *Van de Hurk v. the Netherlands*, paragraph 61; *García Ruiz*, cited above, paragraph 26; *Jahnke and Lenoble v. France* (Decision); and *Perez v. France* [GC], paragraph 81).

41. In addition, from the substance of the case under consideration, it follows that the dismissal of the lawyer from the hearing of 22 August 2018 was not a decisive development capable of influencing the final outcome or affecting regular legal process as a whole, moreover, when it has not been proven that the lawyer was unlawfully removed (see, *mutatis mutandis, Ruiz Torija* and *Hiro Balani*, cited above).

42. Looking at the proceedings as a whole, the Court notes that the regular courts, after assessing the evidence and hearing the witnesses, found: (i) the danger of the Applicant's actions towards the protected party, which resulted in the issuance of the protection order; (ii) have explained the preventive nature of the protection order and the legitimate purpose pursued by the said order; (iii) have rejected the request of the protected party to abolish the Applicant's parental right; and (iv) have determined the amount of the alimony in accordance with the financial situation of the Applicant.

43. The Court notes that the Applicants had the benefit of the conduct of the proceedings based on adversarial principle; that he was able to adduce the arguments and evidence he considered relevant to his case at the various stages of those proceedings; that he was given the opportunity to challenge effectively the arguments and evidence presented by the responding party; and that all the arguments, viewed objectively, relevant for the resolution of his case were heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decisions were examined in detail; and that, according to the circumstances of the case, the proceedings, viewed in entirety, were fair. (See, *inter alia*, case of the Court No. KI118/17, Applicant *Sani Kervan and Others*, Resolution on Inadmissibility of 16 February 2018, paragraph 35; see also *mutatis mutandis*, *Garcia Ruiz v. Spain*, cited above, paragraph 29).

44. The Court reiterates that Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, do not guarantee anyone a favorable outcome in the course of a judicial proceeding nor provide for the Court, to challenge the application of substantive law by the regular courts of a civil dispute, where often one of the parties wins and the other loses. (See, KI118/17, cited above; see also, case of the Court No. KI142/15, Applicant *Habib Makiqi,* Resolution on Inadmissibility of 1 November 2016, paragraph 43).

45. The Court further notes that the Applicant is not satisfied with the outcome of the proceedings before the regular courts. However, the dissatisfaction of the Applicant with the outcome of the proceedings by the regular courts cannot of

itself raise an arguable claim for violation of the constitutional right to fair and impartial trial (see, *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, ECtHR, Judgment of 26 July 2005, paragraph 21; and see also, case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 42).

46. Based on the above, the Court considers that the Applicant has not substantiated the allegations that the relevant proceedings in his case were in any way unfair or arbitrary, and that the challenged decision violated the rights and freedoms guaranteed by the Constitution and the ECHR. (See *mutatis mutandis, Shub v. Lithuania,* No. 17064/06, ECtHR, Decision of 30 June 2009).

47. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis, and is to be declared inadmissible, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure.

**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 (2) of the Rules of Procedure, on 27 November 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**

Bajram Ljatifi



Arta Rama-Hajrizi

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