



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

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Prishtina, 18 February 2020  
Ref. no.: RK 1516/20

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

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI39/19**

Applicant

**Raif Maloku**

**Request for constitutional review of Decision AC. No. 4981/2017 of the  
Court of Appeals of 15 May 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 Raif Maloku from Gjilan, currently residing in Switzerland (hereinafter: the Applicant), who is represented by Teuta Zhinipotoku, a lawyer from Prishtina.

## **Challenged decision**

2. The Applicant challenges the constitutionality of Decision AC. No. 4981/2017 of the Court of Appeals of 15 May 2018, in conjunction with Decision Rev. No. 12/2016 of the Supreme Court of 18 January 2016, Decision Ac. No. 3824/2015 of the Court of Appeals of 29 October 2015, and Decision C. No. 568/2014 of the Basic Court of 14 April 2015.

## **Subject matter**

3. The subject matter of the Referral is the constitutional review of all the aforementioned decisions of the regular courts, which allegedly violate the Applicant's fundamental constitutional rights and freedoms guaranteed by Article 3 [Equality Before the Law], Article 16 [Supremacy of the Constitution], Article 19 [Ratification of International Agreements], paragraphs 1 and 2, Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], paragraphs 1, 2, and 3, Article 37 [Right to Marriage and Family] and Article 50 [Rights of Children] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

## **Legal basis**

4. The Referral is based on Article 113.7 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 7 March 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 12 March 2019, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Safet Hoxha.
7. On 23 March 2019, the Court notified the Applicant about the registration of the Referral and requested that he submit the entire case file.
8. On the same date, the Court notified the Court of Appeals about the registration of the Referral.
9. On 27 March 2019, the Applicant submitted the entire case file.

10. On 15 January 2020, after considering the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the inadmissibility of the Referral.

### **Summary of facts**

11. On 13 August 2014, the Applicant filed claim for dissolution of marriage with the Basic Court in Gjilan against his wife, who is currently residing in Switzerland.
12. On 14 April 2015, a hearing was held in the Basic Court regarding the Applicant's claim. During the trial, the Applicant's representative filed a document with the court issued by the Swiss authorities. The court, having read that document, concluded that on 13 January 2014 the Applicant initiated the proceedings for dissolution of marriage with his wife in Switzerland and that it was ongoing whereas he filed the claim for dissolution of marriage with the Basic Court in Gjilan on 13 August 2014.
13. Accordingly, the Basic Court rendered Decision C. No. 568/2014, dismissing the Applicant's statement of claim for dissolution of marriage as inadmissible.
14. The Applicant filed appeal with the Court of Appeals against Decision C. No. 568/2014 of the Basic Court.
15. On 29 October 2015, the Court of Appeals rendered Decision Ac. No. 3824/2015, which rejected the Applicant's appeal and upheld Decision C. No. 568/2014 of the Basic Court. In the reasoning of the decision, the court stated:

*"... the first instance court, within the meaning of Article 262 of the LCP, correctly held that in the present case there is judicial interdependence for the same statement of claim, therefore the claimant was not entitled to initiate a new dispute, a new trial between the parties, therefore, in this case it has correctly applied Article 391, paragraph 1, item c) of the LCP, dismissing, as inadmissible, the claimant's claim."*
16. The Applicant submitted to the Supreme Court a request for revision against Decision Ac. No. 3824/2015 of the Court of Appeals.
17. On 18 January 2016, the Supreme Court rendered Decision Rev. No. 12/2016, dismissing the Applicant's request for revision as inadmissible, stating: *"...that within the meaning of Article 88 of the Law on the Family of Kosovo (Law No. 03/L-007) no revision can be submitted in this legal matter because the stipulated legal requirements for enjoying the right to revision in disputes of dissolution of marriage are not fulfilled, as in the present case"*.
18. The Applicant filed the request for reopening of proceedings with the Court of Appeals.
19. On 10 October 2017, the Court of Appeals rendered Decision CN. No. 38/2016 dismissing the Applicant's request for reopening of proceedings as ungrounded, stating that: *"In this state of the civil-legal case, after assessing*



*the case file and the proposal for reopening of procedure, this court found that the proposal for reopening of proceedings was ungrounded and should be rejected. This is because the legal requirements for the reopening of the proceedings completed by the decision of the Basic Court in Gjilan and provided for in Article 232, paragraph 1, items f) and g) of the LCP are not fulfilled.....”*

20. The Applicant filed appeal with the Court of Appeals against Decision CN. No. 38/2016 of the Court of Appeals.
21. On 15 May 2018, the panel of the Court of Appeals rendered Decision AC. No. 4981/17, which rejected the Applicant’s appeal as ungrounded, with the reasoning: *„The Court of Appeals finds that there are no reasons for the reopening of the proceedings under Article 232 items a), e) and c) of the LCP, which are presented in the proposal for the reopening of the proceedings of the claimant’s representative”.*

### **Applicant’s allegations**

22. The Court recalls that the Applicant alleges that his fundamental constitutional rights and freedoms have been violated as guaranteed by Article 3, Article 16 paragraph 1, Article 19 paragraphs 1 and 2, Article 21, Article 22, Article 24, Article 31, paragraphs 1, 2 and 3, Article 37 and Article 50 of the Constitution. The Applicant links his allegations with the non-confirmation of the existence or absence of an earlier proceeding for dissolution of marriage in Switzerland by the regular courts of Kosovo.
23. The Applicant states *„...that all decisions of the regular courts were rendered in contravention of the provisions of Article 31, paragraphs 1, 2 and 3 of the Constitution of the Republic of Kosovo, as well as the provisions of the law in force that have to do with publicity and consideration as well as with the equality of the parties in the proceedings, no court instance held a public hearing regarding the issue being addressed. In this way, the fundamental rights under the constitutional provision of Article 31 of the Constitution of the Republic of Kosovo have been violated.”*
24. Referring to Article 3 of the Constitution, the Applicant alleges that the courts at all instances did not respect the principle of equality of the parties to the proceedings, thereby flagrantly violating this principle.
25. The Applicant alleges that *“the second instance decision as well as the third instance decision (revision) did not respect the aspirations of the legal norms, and especially the constitutional norms, because they prejudiced completely the case that occurred to them, because the party presented sufficient facts and through appeal at all instances made it reliable that the divorce proceedings were not conducted in a foreign country, but that there were divorce proceedings, that they held one hearing before the Lachen District Court, in which the court rendered decision on the divorce, which it sent to the parties’ addresses, but the respondent did not receive a court decision and thereafter the respondent withdrew the claim, and after this the claimant*

*withdrew the claim for annulment of the marriage, thus concluding the issue of dissolution of marriage before the state of Switzerland“.*

26. The Applicant further states that *“the decisions of the Supreme Court of the Republic of Kosovo, as well as the decisions of the Court of Appeals in the present case, constitute a discriminatory aspect against a party that is not protected by the court authorities by the mere fact that his allegations have not been assessed at any court instance and as such, at our surprise, no decision is on merits”.*
27. More specifically, the Applicant claims that *“the decisions of the courts in question did not allow the party seeking access to the court system, but it was rejected in its entirety without being given any opportunity to process it with the evidence he possessed in the exercise of his rights under the services executed in accordance with the law in force and its standard norms”.*
28. The Applicant also alleges that the competent courts violated his fundamental rights protected by law and the Constitution itself, as they were not aware of the decision by the Court of Appeals of Kosovo regarding the request for reopening of the proceedings, because *“the decision was handed to the lawyer Y H a and the claimant never learned of the court’s decision nor was informed by the court and lawyer Y H, nor by the lawyer T Zh, u who was authorized.”*
29. The Applicant alleges that he *“revoked the authorization given to lawyer Y H as of January 2018, authorizing the lawyer TZh on 27.2.2018, when the lawyer TZh addressed the Court of Appeals on 4 April 2018 by a submission and attached the authorization in question. She also constantly addressed the same court with various letters, on 2.5.2018, 11.6.2018 and 3.7.2018 with the urgency of accelerating the case, but she never received a reply”.* In support of his allegation, the Applicant in the case file also submitted a certificate from lawyer Y H (stamped and signed).
30. Finally, the Applicant adds *“we propose to the Constitutional Court of the Republic of Kosovo that based on the Rules of Procedure of this Court, as well as based on the provisions of the Law on the Constitutional Court of the Republic of Kosovo, after the party has been invited to a public hearing, at which additional evidence will be presented, or according to its assessment (out of session) renders this”.*
31. The Applicant addresses to the Court with a request to approve his referral as grounded, to annul all the decisions of the regular courts, to remand the proceedings for retrial. The Applicant also requests the Court to recommend to the Supreme Court that he be paid all the expenses incurred during the course of the proceedings.

### **Admissibility of the Referral**

32. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and Rules of Procedure.



33. 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.”*

34. In addition, the Court also examined whether the Applicant has fulfilled the admissibility requirements as further specified in the Law. In this respect, the Court refers to Articles 48 [Accuracy of the Referral and 49 [Deadlines] of the Law, which provide:

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... .”*

35. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraph (1) (c) and paragraph (3) (b) of the Rules of Procedure, which establishes:

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

*[...]*

*(c) the referral is filed within four(4) months from the date on which the decision on the last effective remedy was served on the Applicant.*

*(3) The Court may also consider a referral inadmissible if any of the following conditions are present:*

*[...]*

*(b) the Referral is incompatible ratione materiae with the Constitution; [...].”*

36. Upon review of the Applicant's case file, the Court finds that he conducted two court proceedings before the regular courts in the Republic of Kosovo.

***First court proceedings***

37. On 13 August 2014, the Applicant initiated the first court proceeding with a claim for dissolution of marriage. The Court finds that this first court proceeding was completed with a final Decision Rev. No. 12/2016 of the Supreme Court of 18 January 2016.

38. The Court came to this conclusion by linking its findings in the present case, with the constitutional and legal provisions, which stipulate that the referral before the court *“is filed within four(4) months from the date on which the decision on the last effective remedy was served on the Applicant.”*
39. In this regard, the Court recalls that the time-limit within which the Applicant was able to file the Referral with the Constitutional Court in the first court proceeding began to run on the date on which Decision Rev. No. 12/2016 of the Supreme Court was served on him or his legal representative, which he had during the entire first court proceedings, which can be seen from the case file and the decisions of the regular courts.
40. Therefore, the Court finds that the Referral related to the first court proceeding is out of the time-limit because it was not filed in accordance with Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure.

### ***Second court proceedings***

41. In the following, with regard to the second court proceeding, which the Applicant initiated with the request to the Court of Appeals, in which he requested the reopening of the proceedings, and which was completed by Decision AC. No. 4981/17 of the Court of Appeals of 15 May 2018, the Court states that it will not engage in the analysis of the Applicant's allegations, and nor the allegation *„that he withdrew the authorization he had given to lawyer YH back in January 2018, authorizing another lawyer to represent him in the proceedings on the request for the reopening of the proceedings“*, and on the ground that the request upon this court proceedings is not in accordance with Rule 39 (3) (b) of the Rules of Procedure.
42. More specifically, the Court, having regard to the fact that the particular proceedings relate exclusively to the issue of the reopening of civil proceedings, states that in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”*
43. In this regard, taking into account the Applicant's allegation of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, which the Court may review exclusively in connection with the request for reopening of the court proceedings, the Court recalls the case law of the ECtHR and its own case law, according to which Article 31 of the Constitution and Article 6 of the ECHR do not apply to requests for the reopening or repeating of proceedings. (see: by analogy Constitutional Court cases: KI07/17/15, *Pashk Mirashi*, Resolution on Inadmissibility of 12 June 2017, paragraph 64; KI80/15, 81/15 and 82/15, *Rrahim Hoxha*, Resolution on Inadmissibility of 27 December 2016, paragraph 31, KI76/18, *Pjetër Boçi*, Resolution on Inadmissibility, of 14 December 2018, see also ECtHR cases, *inter alia*, *Oberschlick v. Austria*, No. 23727/94, Decision on Inadmissibility of 21 March 1994; *Dowsett v. United Kingdom*, No. 8559/08, Decision on Inadmissibility of 4 January 2011, *Sablon v. Belgium*, No. 36445/97, Judgment of 10 April 2001, paragraph 86).



44. The Court also recalls that Article 6 of the ECHR does not apply to unsuccessful attempts to reopen criminal or contested proceedings, based on new facts or through an extraordinary or special review for procedural reasons, which are not directly accessible to natural persons and which enforcement depends on discretionary powers of a specific authority (see ECtHR decision *Tumilovich v. Russia*, application 47033/99, of 22 June 1999).
45. Moreover, Article 6 of the ECHR does not apply as long as the domestic authorities do not agree to reopen the proceedings, even in cases where the Applicant has filed a request for reopening thanks to a previous judgment of the Court, which found that there has been a violation of the Convention regarding the challenged proceedings before the domestic courts (see ECtHR judgment *Franz Fischer v. Austria*, application no. 37950/97, of 29 May 2001). However, as soon as the proceedings are reopened or when an extraordinary review of the proceedings is approved, the safeguards referred to in Article 6 of the ECHR apply to the entire court proceeding (see ECtHR decision *Vanyan v. Russia*, application 53203/99, 15 December 2005 paragraphs 56–58).
46. Accordingly, the Court concludes that the Applicant's request for repetition of the court proceedings is incompatible *ratione materiae* with Article 31 of the Constitution in conjunction with Article 6 of the ECHR.
47. Therefore, the Applicant's Referral relating to the second court proceeding is not *ratione materiae* because it is outside the jurisdiction of the court and, as such, is to be rejected in accordance with Rule 39 (3) (b) of the Rules of Procedure.
48. Finally, having regard to the fact that the court proceedings, which ended on 18 January 2016, by Decision Rev. No. 12/2016, of the Supreme Court, the Court dismissed in accordance with Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, whereas the court proceeding regarding the reopening of the proceeding, which ended by Decision AC. No. 4981/2017 of the Court of Appeals on 15 May 2018, dismissed in accordance with Rule 39 (3) (b) of the Rules of Procedure, states that it will not further engage in the analysis of the Applicant's other allegations of violation of other Articles of the Constitution and the ECHR.
49. In view of all the foregoing, the Court also rejects the Applicant's request for a public hearing.



## **FOR THESE REASONS**

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 49 of the Law and Rules 39 (1) (c), and (3) (b) of the Rules of Procedure, in the session held on 15 January 2020, unanimously

## **DECIDES**

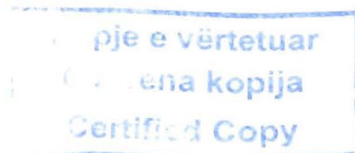
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**

Remzije Istrefi-Peci

Arta Rama-Hajrizi



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