



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

Prishtina, on 16 March 2020  
Ref. no.:RK 1529/20

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

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI09/19**

Applicant

**Leutrim Hajdari**

**Constitutional review of Decision C. No. 239/2017 of the Basic Court in  
Peja – Branch in Klina of 6 September 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 Leutrim Hajdari from Klina (hereinafter: the Applicant), who is represented by the authorized representative Bedri Gashi, a lawyer from Klina.

## **Challenged decision**

2. The Applicant challenges Decision C. No. 239/2017 of the Basic Court in Peja - Branch in Klina of 6 September 2018.

## **Subject matter**

3. The Applicant does not specify in the Referral what constitutional rights and freedoms he claims to have been violated, but requests the Constitutional Court (hereinafter: the Court) to interpret and assess the constitutionality and legality of the divorce proceedings initiated by him, before the Basic Court in Peja - Branch in Klina.

## **Legal basis**

4. The Referral is based on Article 113.7 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] 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**

5. On 14 January 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 15 January 2019, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).
7. On 24 January 2019, the Court notified the Applicant about the registration of the Referral and requested that clarifies about the exhaustion of legal remedies, answering the question whether he took any procedural steps with regard to his Referral. By this notification, the Court also requested that the Applicant submit his power of attorney for his representative.
8. On 1 February 2019, the Applicant submitted to the Court the power of attorney for the legal representative, stating that the proceedings upon his request were pending before the Basic Court in Peja - Branch in Klina, with case number C. No. 239/17.
9. On 16 April 2019, the Court notified the Basic Court in Peja - Branch Klina about the registration of the Referral and invited it to submit its comments, if any, within fifteen (15) days of receipt of the Court's letter.
10. On 30 April 2019, the Basic Court in Peja - Branch in Klina, submitted its comments regarding the case number C. No. 239/17.

11. On 3 May 2019, the Applicant submitted to the Court additional documents, as well as Decision C. No. 239/17 of the Basic Court in Peja - Branch in Klina of 6 September 2018.
12. On 23 August 2019, the Applicant submitted additional comments, as well as Decision Ac. No. 2656/19 of the Court of Appeals of 29 July 2019, by which the Court of Appeals annulled Decision C. No. 239/17 of the Basic Court in Peja - Branch in Klina, and remanded the case to the latter for retrial.
13. On 5 February 2020, 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. The Court notes that there are two sets of the court proceedings in the present case. The first set of proceedings relates to a lawsuit for dissolution of marriage, decided by Decision No. 62–2018–1939 (505) of the District Court in Fier, Republic of Albania, of 12 April 2018; the second set of proceedings relates to the lawsuit of dissolution of marriage filed by the Applicant with the Basic Court in Peja - Branch Klina. The Court will therefore present them separately in this report.

#### ***Proceedings regarding the request for dissolution of marriage filed with the District Court in Fier, Republic of Albania***

15. On 8 September 2017, A. D., the Applicant's ex-wife, filed a request for dissolution of marriage with the District Court in Fier, Republic of Albania.
16. On 12 April 2018, the Court of the District Court in Fier, Republic of Albania, rendered Decision No. 62–2018–1939 (505), by which it dissolved the marriage between the Applicant and his ex-spouse, residing in Fier, Republic of Albania. By the same decision, the Court decided that the minor child of (former) spouses should remain in the custody of the mother, namely the Applicant's ex-spouse.
17. Against this decision, the Applicant filed an appeal with the Court of Appeals in Vlora. His main allegation in this appeal was that the District Court in Fier had no territorial jurisdiction to adjudicate and decide regarding this matter, as the marriage was concluded in Klina - Republic of Kosovo, where the spouses had their last common residence.

#### ***Proceedings regarding the request for dissolution of marriage filed with the Basic Court in Peja - Branch in Klina***

18. On 18 July 2017, the Applicant filed a request for dissolution of marriage with the Basic Court in Peja - Branch Klina.
19. It follows from the case file that before the Basic Court in Peja - Branch in Klina that three court hearings were held on this matter (10.01.2018, 17.04.2018, 08.06.2018).

20. On 6 September 2018, the Basic Court in Peja - Branch Klina, by Decision C. No. 239/2017, terminated the proceedings on this matter because it found that *"two proceedings are being conducted on the same case and there is a final decision and the latter has been challenged by the claiming party and his representative and it is reasonable for both parties to clear up the issue about this procedure regarding the jurisdiction"*. Accordingly, the Basic Court in Peja - Branch Klina terminated this procedure *"until the preliminary issue regarding the recognition of the Judgment of the Republic of Albania of 16.04.2018,, decision no. 62-2018-1939, issued by the District Court in Fier, Republic of Albania"*.
21. The Applicant filed appeal with the Court of Appeals against the Decision of the Basic Court in Peja - Branch in Klina, on the grounds of essential violation of the provisions of the contested procedure, erroneous or incomplete determination of factual situation and erroneous application of the substantive law, with the proposal that the decision of the Basic Court be annulled.
22. On 29 September 2019, the Court of Appeals, by [Decision Ac. No. 2656/2019] upheld the Applicant's appeal as grounded, annulled the decision of the Basic Court in Peja - Branch in Klina and remanded the case to the latter for retrial. The Court of Appeals stated in its reasoning: *"The first instance court assessed that the contested procedure in this case should be suspended until the preliminary issue regarding the recognition of the judgment of the Republic of Albania [...] rendered by the District Court in Fier is resolved. The Court of Appeals cannot accept as fair and lawful such a legal assessment of the first instance court. In the present case, the challenged decision contains the major contradictions [...] The first instance court reasoned such a decision by the fact that there is a judgment in the case file in the District Court in Fier, which it claims that it has become final and the same was challenged by the claimant. However, such a challenged court decision cannot become final until it is decided in other instances on the appeal. Moreover, the reasoning of the challenged judgment states that there is a request for the recognition of this judgment to be decided. However, there is no evidence in the case file to establish that such a request exists [...] The fact whether another court proceedings is conducted in the present case, or whether there is some final decision is not a reason for termination of the proceedings by the first instance court however, such facts would enable the court to ascertain the existence of litispendence, namely to establish the fact that it is about the adjudicated case in which case the conditions for rejecting the claim could eventually be met, but no way to terminate the proceedings. The Court of Appeals cannot assess whether the conditions for termination of the contested procedure have been met for the reasons given by the court of first instance, and therefore concludes that the challenged decision should be annulled, and matter be remanded for retrial"*.

### **Applicant's allegations**

23. The Applicant did not accurately state what fundamental rights and freedoms have allegedly been violated by the challenged judgment.

24. The Applicant requests the Court to assess the constitutionality and legality of the divorce proceedings initiated by his claim before the Basic Court in Peja - Branch in Klina [...] and which were terminated without legal basis, after holding three court sessions.
25. The Applicant alleges the following: *"we have two unlawful proceedings by these courts, both the Court in Klina - Kosovo, which has suspended the proceedings, and the Court in Fier – Republic of Albania, which has decided on dissolution of marriage"*.
26. The Applicant further alleges that *"for divorce of spouses, both residents and Kosovo citizens, has decided on divorce without a right and incompetent court of another state, such as the District Court in Fier - Republic of Albania [...] Judge in the proceeding, E.L., without the presence of the parties – spouse, , Leutrim Hajdari, in a decision of 11 pages, on approval of the statement of claim for divorce of A.H., [...] among other, the child is also entrusted to the claimant, as the mother of the child"*.
27. The Applicant further notes that, according to the instructions of the case judge in the Basic Court in Peja-Branch in Klina, he filed appeal with the Court of Appeals in Vlora against the decision of the first instance court in Fier, but even six months after the appeal was filed, the Court of Appeals in Vlora has not rendered any decision.
28. Finally, the Applicant requests the Court *"to assess the constitutionality and legality of the matter mentioned in the appeal"*.

#### **Comments submitted by the Basic Court in Peja - Branch in Klina**

29. With regard to the Applicant's Referral, in its reply, the Basic Court in Peja - Branch in Klina, *inter alia*, clarified the following:

*"it has been established by the respondent and her authorized representative, that two proceedings are being conducted in parallel on the same matter and the respondent submitted decision No. 62-2018-1939 (505) of 12.04.18 to the court which has become final on 12.05.2018, issued by Judge Ejona Lazellari by the District Court in Fier. As the representative of the respondent proposed that this case be terminated, as the said decision was challenged by the claimant with the appeal filed by the claimant with the Court of Appeals in Vlora dated 07.05.2018. The respondent filed the abovementioned decision rendered by the District Court in Fier for its recognition, but since the claimant has filed the appeal and the latter was filed in time, and in this case the request for recognition of the foreign judgment was rejected. From all of the foregoing, the court of this case has suspended the proceedings pursuant to Decision C no 239/17 of 06.09.2018 until the case is decided by the Court of Appeals in Vlora, since in this case we have to deal with litispedence where the same issue cannot be conducted in parallel with two proceedings"*.

## Admissibility of the Referral

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

31. 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”.*

32. In this regard, the Court notes that the Applicant is an authorized party challenging the act of a public authority, namely Decision [C. No. 239/2017] of the Basic Court in Peja - Branch in Klina of 6 September 2018.

33. However, the Court notes that paragraph 7 of Article 113 of the Constitution also provides the obligation to exhaust *“all legal remedies provided by law”*. This constitutional obligation is also established in paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure. The latter 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”.*

### Rule 39 [Admissibility Criteria]

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

*(...)*

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

34. In this regard, the Court reiterates that paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law, and item (b) paragraph (1) of Rule 39 of the Rules of Procedure, clearly establish the obligation of *“exhaustion of legal remedies provided by law”*, provided that a referral is declared admissible and its merits are examined by the Constitutional Court.



35. The criteria for assessing whether this obligation has been fulfilled are clearly set out in the case law of the Constitutional Court and further supported by the case law of the European Court of Human Rights (hereinafter: the ECHR), in accordance with which, under Article 53 [Interpretation of the Human Rights Provisions] of the Constitution, the Constitutional Court is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.
36. The rationale behind the requirement to exhaust the legal remedies or the exhaustion rule, is to afford the relevant authorities, primarily the regular courts, the opportunity to prevent or put right the alleged violations of the Constitution. It is based on the presumption, that the Kosovo legal order provides an effective remedy for the protection of constitutional rights. This is an important aspect of the subsidiary nature of the constitutional justice machinery. (See and among others, see also the cases of the Court: KI07/15, Applicant *Shefki Zogiani*, Resolution on Inadmissibility of 8 December 2016, paragraph 61; KI30/17, Applicant *Muharrem Nuredini*, Resolution on Inadmissibility of 7 August 2017, paragraph 35; KI41/09, Applicant *AAB-RIINVEST University L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 16; and, KI94/14, Applicant *Sadat Ademi*, Resolution on Inadmissibility of 17 December 2014, paragraph 24).
37. The Court reiterates that this approach requires that, before addressing the Court, the Applicants of constitutional complaints must exhaust all procedural possibilities in regular administrative or judicial proceedings, to prevent violations of human rights and freedoms guaranteed by the Constitution or, if any, to remedy such a violation of the rights guaranteed by the Constitution. (See, in this regard, the cases of the Court KI62/16, Applicant *Bekë Lajçi*, Resolution on Inadmissibility, of 10 February 2017, paragraphs 59-60; KI07/09, Applicant: *Demë Kurbogaj and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paragraphs 18-19; Case No. KI109/15, Applicant: *Milazim Nrecaj*, Resolution on Inadmissibility of 17 March 2016, paragraphs 27-28; and KI148/15, Applicant: *Xhafer Selmani*, Resolution on Inadmissibility of 15 April 2016, paragraphs 27-28).
38. However, the ECtHR case law also specifies the exemptions and criteria on the basis of which these exemptions may apply, stating that the exhaustion rule, is to be applied with some “*degree of flexibility and without excessive formalism*”, given the context of protecting human rights (see, in this context, and, *inter alia*, the case of Court KI84/17, Applicant *Bahri Maxhuni*, Resolution on Inadmissibility of 31 May 2018, paragraphs 25, 26 and 27).
39. One of these exceptions, according to the ECtHR case law, is the non-obligation on individuals to exhaust, in principle, the discretionary or extraordinary remedies at their disposal (see, in this regard, the ECtHR case, *Cinar v. Turkey*, Judgment of 13 November 2013 and *Prystavka v. Ukraine*, Judgment of 17 December 2002; see also Practical Guide to the ECtHR on Admissibility Criteria of 30 April 2019, I. Procedural Grounds for Inadmissibility, A. Non-exhaustion of domestic remedies, 2. Application of the rule, e. Existence and appropriateness, paragraph 77).

40. In the circumstances of the present case, the Court notes that the Applicant after being notified about the contents of the Decision C. No. 239/2017 of the Basic Court of 6 September 2018, filed appeal with the Court of Appeals, which on 29 September 2019 [by Decision Ac. No. 2656/2019], upheld his appeal as grounded, annulled the decision of the Basic Court and remanded it to the latter for retrial. Consequently, it follows that the proceedings before the Basic Court in Peja - Branch in Klina have not yet been completed.
41. The Court has already established in its case law that if the proceedings are pending before the regular courts, then the Referral of the Applicants is considered premature. (see, in this context, the cases of the Court, KI23/10, Applicant *Jovica Gadžić*, Resolution on Inadmissibility, of 19 September 2013; KI32/11, Applicant *Lulzim Ramaj*, Resolution on Inadmissibility of 20 April 2012; KI113/12, Applicant *Haki Gjocaj*, Resolution on Inadmissibility of 25 January 2013, paragraph 34; KI114/12, Applicant *Kastriot Hasi*, Resolution on Inadmissibility of 3 April 2013, paragraph 33; KI07/13, Applicant *Ibish Kastrati*, Resolution on Inadmissibility of 5 July 2013, paragraphs 28-29; KI58/13, Applicant *Sadik Bislimi*, Resolution on Inadmissibility, of 25 November 2013, paragraph 31; and KI102/16, Applicant *Shefqet Berisha*, Resolution on Inadmissibility, of 2 March 2017, paragraph 39).
42. In the circumstances of the present case, based on the principle of subsidiarity, the Court is required to declare the Applicant's Referral inadmissible as premature, because the legal effective remedies have not been exhausted in his case.
43. Therefore, the Referral is declared inadmissible, in accordance with paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and further specified in item (b) paragraph (1) of Rule 39 of the Rules of Procedure.



## **FOR THESE REASONS**

The Constitutional Court, in accordance with Articles 113.1 and 113.7 of the Constitution, Articles 20 and 47.2 of the Law and Rule 39 (1) (b) of the Rules of Procedure, on 5 February 2020, unanimously

## **DECIDES**

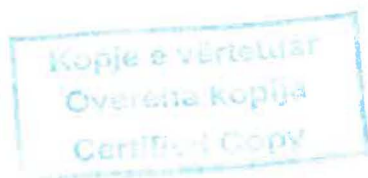
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the parties;
- III. TO PUBLISH this Decision in the Official Gazette;
- IV. This Decision is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**

Bekim Sejdiu

Arta Rama-Hajrizi



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