



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

Prishtina, on 10 April 2020  
Ref. no.:RK 1542/20

*This translation is unofficial and serves for information purposes only*

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI212/19**

Applicant

**Shaban Gashi**

**Constitutional review of Judgment AA. No. 396/2019 of the Court of Appeals, of 22 October 2019**

### **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 Applicant is Mr. Shaban Gashi, residing in Peja (hereinafter: the Applicant).

## **Challenged decision**

2. The Applicant challenges the constitutionality of Judgment [AA. No. 396/2019] of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals), of 22 October 2019.

## **Subject matter**

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's rights guaranteed by Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

## **Legal basis**

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 22 [Processing Referrals] 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 22 November 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 27 November 2019, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka-Nimani (Presiding), Safet Hoxha dhe Radomir Laban.
7. On 20 December 2019, the Court notified the Applicant about the registration of the Referral and requested him to submit the power of attorney proving that he is represented by the lawyer mentioned in the Referral . On the same date, the Court submitted a copy of the Referral to the Court of Appeals.
8. On 30 December 2019, the Applicant through a letter notified the Court the he will represent himself.
9. On 12 March 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

## **Summary of facts**

10. The Applicant used to work as a teacher of history at Primary School "Ismail Qemali" in Prishtina from 1 September 1982 until 31 August 1991, where he was dismissed from work.

11. Upon reaching the retirement age, the Applicant addresses the Ministry of Labor and Social Welfare - Department of Pensions (hereinafter: the MLSW) with a request for recognition of the right to age contribution-payer pension.
12. On 17 August 2017, the MLSW by Decision [No. 285978] rejected the Applicant's request for recognition of the right to age contribution-payer pension, reasoning that the Applicant presented material evidence showing that he had only 12 years and 3 months and 16 days of contribution-payer work experience prior to 1999.
13. On 2 October 2017, the Applicant filed a claim with the Basic Court in Prishtina (hereinafter: the Basic Court) with the request that his claim be approved and the decision of MLSW of 17 August 2017 be annulled.
14. On 14 March 2019, the Basic Court by Judgment [A. No. 1645/17] rejected the Applicant's statement of claim as ungrounded.
15. On 30 April 2019, the Applicant filed an appeal with the Court of Appeals against the Judgment [A. No. 1645/17] of 14 March 2019 of the Basic Court, on the grounds of incomplete and erroneous determination of factual situation and erroneous application of substantive law.
16. On 22 October 2019, the Court of Appeals by Judgment [AA. No. 396/2019] rejected the Applicant's appeal as ungrounded and upheld the Judgment of the Basic Court.

### **Applicant's allegations**

17. The Applicant alleges that the Court of Appeals, by rejecting his appeal as ungrounded and by failing to give legal advice, violated his rights protected by Article 32 [Right to Legal Remedies] of the Constitution.
18. According to the Applicant, the rejection of the request for recognition of work experience by the MLSW was unfair because: *"the reasons of the respondent are inconsistent, they have not been proved because I was forced to leave the job because of the Serbian occupier of that time, as it was the case with many other teachers, thus being discriminated against on the basis of pretexts and various forms of a political character and on a national basis as assessed by the ILO in its confidential report no. GB253/15/27 May-June 1992 Geneva"*.
19. The Applicant states that the Court of Appeals, by rejecting the appeal as ungrounded and by failing to provide legal advice on the use of extraordinary legal remedies with the Supreme Court, violated his right to legal remedies guaranteed by Article 32 of the Constitution. In this regard, the Applicant alleges that the violation of Article 32 of the Constitution consists in the fact that he has been prevented from *"filing allegations as a fundamental right, that I have been denied pension contribution"*.
20. Finally, the Applicant requests the Court to: *"make a correct interpretation of the law and consider my request as grounded"*.

## Admissibility of the Referral

21. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and the Rules of Procedure.
22. 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.”*

23. The Court further refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

### Article 47 [Individual Requests]

*“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”.*

### 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 [...]*

24. As to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party; he challenges an act of a public authority, namely Judgment [AA. No. 396/2019] of 22 October 2019 of the Court of Appeals; he has clarified the rights and freedoms he claims to have been violated; has



exhausted all legal remedies provided by law, as well as, he submitted the Referral within the legal deadline.

25. However, in addition to these criteria, the Court also examines whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Specifically, Rule 39 (2) stipulates 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.”*

26. In this regard, the Court first recalls that the Applicant alleges that the Court of Appeals, by Judgment [AA. No. 396/2019] of 22 October 2019 violated his rights guaranteed by Article 32 [Right to Legal Remedies] of the Constitution.
27. In this regard, the Court notes that, in substance, the Applicant complains that in his case the regular courts did not correctly determine the factual situation because they did not recognize the contributory work experience for the period 1991-1998, which, according to him, did not take into account the fact that he was forced to leave his job during these years of work.
28. With regard to the abovementioned allegations, the Court considers that the Applicant built his case on the basis of legality, namely on erroneous determination of facts as to the contributory work experience and on erroneous interpretation of the Law on State-funded Pension Schemes by the Court of Appeals and those of lower instances, including the MLSW as an administrative body that initially rejected his application for recognition of the right to a contributory age pension.
29. The Court recalls that these allegations relate to the domain of legality and as such do not fall within the jurisdiction of the Court and, therefore, in principle, cannot be considered by the Court (See, case of the Court KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 35).
30. In this regard, 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). 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 accordance with the ECtHR case law and also with its already consolidated case law, the Court reiterates that it is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law and that abstract assessments cannot be made as to why a regular court has decided in a respective manner and not otherwise. (See, case *García Ruiz v. Spain*, ECtHR No. 30544/96, of 21 January 1999, paragraph 28 and see, also case of the Court KI70/11, Applicant: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011).

31. The Constitutional Court can only examine whether the evidence in a proceeding has been correctly presented and whether the proceedings in general, viewed in their entirety, have been held in such a way that the Applicant has had a fair trial (see, among other authorities, case *Edwards v. United Kingdom*, No. 13071/87, European Commission Report on Human Rights, adopted on 10 July 1991).
32. Based on the case file, the Court notes that the reasoning given in the Judgment of the Court of Appeals is clear, and after considering all the proceedings, the Court also found that the proceedings before the Court of Appeals and the Basic Court were not unfair or arbitrary. (See case *Shub v Lithuania*, No. 17064/06, ECtHR Decision of 30 June 2009).
33. In the circumstances of the present case, in order to further elaborate on the general principles of constitutional adjudication, the Court notes that the Court of Appeals rejected the Applicant's request as ungrounded and upheld the Judgment of the Basic Court, based on Article 8 of Law 04/L-131 on Pension Schemes Financed by State, because the Applicant did not provide convincing evidence of fifteen (15) years of work experience, as required by the provision of the aforementioned Article (See case KI53/19, Applicant *Muharrem Mehmeti*, Resolution on Inadmissibility of 2 March 2020, paragraph 33).
34. More specifically, the Court of Appeals in its Judgment stated as follows:

*"The first instance court, assessing the legality of the challenged decision within the meaning of Article 44 paragraph 1 of the Law on Administrative Conflicts, in respect of claims in the lawsuit, evidence administered at the hearing and after reviewing other case files, rightly referred to Article 8 paragraph 1 of Law No. 04/L-131 on Pension Schemes Financed by State, and Article 6 paragraph 2 of Administrative Instruction No. 09/2015 on Categorization of Pension Beneficiaries contributory Pensions. Because Article 8 (1) of the above-mentioned law provides that "1. The right to age contribution-payer pension shall be realized by all persons who have citizenship of Kosovo and who: 1.1 have reached the age of sixty-five (65); 1.2. should have pension contribution-payer work experience, according to the Law on pension and disability insurance, No. 011-24/83 (Official Gazette of SAPK No.26/83) before the date 01.01.1999.*

*Whereas, from the administered evidence that are in the case file, and the assessment separately and all together, it has rightly found that the claimant has not fulfilled the criteria for recognition of the right to age contribution-payer pension under Article 8 of the said law because it did not present sufficient evidence within the meaning of this law for 15 years of contribution-payer work experience, since material evidence has established that the latter has only 12 years and 3 months and 16 days of contribution-payer work experience before 01.01.1999, as the respondent has proved in the decision challenged in the lawsuit".*

35. In this regard, the Court further considers that the Applicant did not substantiate that the proceedings before the Court of Appeals or other regular



courts were unfair or arbitrary, or that his fundamental rights and freedoms protected by the Constitution were violated, as a result of erroneous interpretation of the substantive or procedural law. The Court reiterates that the interpretation of the procedural law. The Court reiterates that the interpretation of law is a duty of the regular courts and as such is a matter of legality (See, case KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility of 8 August 2016, paragraph 44; and also see case KI150/15; KI161/15; KI162/15; KI14/16; KI19/16; KI60/16 and KI64/16, Applicants *Arben Gjokaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku and Sami Lushtaku*, Resolution on Inadmissibility of 15 November 2016, paragraph 62).

36. The Court recalls that the Applicant also alleges that in the circumstances of the present case, the challenged Judgment of the Court of Appeals was rendered in violation of his fundamental rights and freedoms guaranteed by Article 32 of the Constitution.
37. As to the Applicant's allegations of a violation of Article 32 of the Constitution, the Court recalls that in principle and in its entirety, Article 54 of the Constitution on judicial protection of rights, Article 32 of the Constitution on the right to legal remedy and Article 13 of the ECHR on the right to an effective remedy guarantee: (i) the right to judicial protection in the event of a violation or denial of any of the rights guaranteed by the Constitution or by law; (ii) the right to use legal remedy against judicial and administrative decisions which infringe the rights guaranteed in the manner provided by law; (iii) the right to an effective legal remedy if it is found that a right has been violated; and (iv) the right to an effective remedy at national level if a right guaranteed by the ECHR has been violated. (See case, KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo (LDK)* of 4 February 2019, paragraphs 195-198).
38. However, the Court reiterates that the Applicant does not in any way substantiate his allegations of violation of these rights. In fact, the Court notes that the Applicant has used effective legal remedies at his disposal, and that the revision and the request for protection of legality fall within the scope of extraordinary remedies. Thus, the rendering of legal advice by the Court of Appeals is not its obligation and cannot in any way result in substantiated allegations of a violation of the rights guaranteed by Articles 32 and 54 of the Constitution..
39. In line with its consolidated case law, the Court further notes that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts, namely the decisions of the Court of Appeals and that of the Basic Court, 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; and see also case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 42).
40. As a result, the Court considers that the Applicant did not substantiate the allegations that the relevant proceedings were in any way unfair or arbitrary

and that the challenged decision violated the rights and freedoms guaranteed by the Constitution and the ECHR.

41. In conclusion, pursuant to 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 of the Republic of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, and Rule 39 (2) of the Rules of Procedure, on 12 March 2020, unanimously

### **DECIDES**

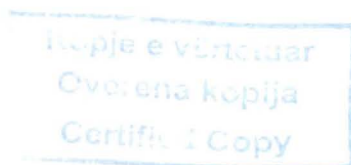
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and
- IV. This Decision is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**

Bajram Ljatifi

Arta Rama-Hajrizi



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