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

**Prishtina, on 18 May 2020**
**Ref. no.: RK 1567/20**

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

# RESOLUTION ON INADMISSIBILITY

in

**Case No. KI31/19**

Applicant

**Shpresa Ferati - Duraku**

**Request for constitutional review of Judgment Rev. No. 387/2018 of the Supreme Court of 5 December 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 Shpresa Ferati-Duraku from Mitrovica (hereinafter: the Applicant), who is represented by Safet Voca, a lawyer from Mitrovica.

## Challenged decision

2. The Applicant challenges Judgment Rev. No. 387/2018 of the Supreme Court of 5 December 2018.

## Subject matter

3. Subject matter is the constitutional review of the challenged Judgment which allegedly violates the Applicant's rights and freedoms guaranteed by Article 24 [Equality Before the Law], Article 31 paragraph 1 [Right to Fair and Impartial Trial], Article 49 paragraph 1 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as the rights guaranteed by Article 6 paragraph 1 (Right to a fair trial), Article 13 paragraph 1 (Right to an effective remedy), Article 17 paragraph 1 (Prohibition of abuse of rights), and Article 1 (General prohibition of discrimination) paragraph 2 of Additional Protocol No. 12 of the European Convention on Human Rights (hereinafter: ECHR).

## 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 25 February 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 4 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 8 March 2019, the Court notified the Applicant's legal representative about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 15 January 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

9. On 16 November 2013, the Municipal Directorate of Health and the Main Center for Family Medicine (hereinafter: MFMC "Dr. Nexhat Çuni"), in Mitrovica, announced in the daily newspaper "Lajm" a public vacancy for the admission of an employee in the job position assistant in warehouse at MFMC "Dr. Nexhat Çuni".

10. Based on the case file, it follows that the Applicant applied in the announced job vacancy.

11. On 17 December 2013, the Selection Committee announced the results of the vacancy, on the basis of which the Applicant achieved the best results during the interview.

12. On 16 April 2014, the Municipal Health Directorate of the Municipality of Mitrovica sent the notice Ref. 10 - 031 - 12998, to the Steering Committee of MFMC "Dr. Nexhat Çuni", in which she requested that the vacancy be canceled because of "*doubts about the objectivity of the committee and the procedures for announcing the vacancy*".

13. On 8 May 2014, the Steering Committee of MFMC "Dr. Nexhat Çuni" rendered the decision to annul the vacancy. The notice of annulment of the vacancy was also sent to the Applicant. The notice reads:

> *"Following the notification of the Municipal Directorate of Health Ref /10 - 031 - 12998 of 16.04.2014, whereby we are obliged to cancel the vacancy of 16.11.2013, published in the newspaper "Lajm", the Department of Administration and Personnel of the Main Family Medicine Center informs you that the vacancy is canceled as per the mandatory notice mentioned above by MDH for the positions*".

14. On 28 May 2014, the Applicant filed a complaint against the notice of cancellation with the Appeals Committee, alleging that the decision of the Municipal Health Directorate in Mitrovica was unfair and unlawful *"because it is in flagrant violation of the relevant provisions of the Law on Labor of Kosovo"*.

15. On 6 June 2014, the Appeals Committee held a session to examine the Applicant's complaint. On the same date, the Appeals Committee rendered a decision rejecting the Applicant's complaint as ungrounded. The reasoning of the decision states, among other things:

> *"The Directorate of Health with the purpose of eliminating doubts about the objectivity of the committee and the procedures for announcing the vacancy of 16.11.2013 considers that the procedures are not in conformity with the provisions in force, so it decided to cancel this vacancy..."*

16. Meanwhile, the Municipal Directorate of Health in Mitrovica and MFMC "Dr. Nexhat Çuni" again announced a vacancy for the same job position where the Applicant did not apply, as stated in the Referral *"considering that she was admitted in a regular and lawful manner"*.

17. The Applicant filed a claim with the Basic Court in Mitrovica, against the Municipal Directorate of Health and MFMC "Dr. Nexhat Quni", whereby requesting „*annulment of the decision to cancel the vacancy and confirmation of the existence of the employment relationship"*.

18. On 16 December 2014, the Basic Court in Mitrovica rendered Judgment C. No. 321/2014, which approved the Applicant's statement of claim, annulled the decision of the MFMC "Dr. Nexhat Çuni" in Mitrovica, of 8 May 2014 and obliged the respondent to enable the claimant (Applicant) to sign the employment contract based on the results of the vacancy of 16 November 2014. In the judgment, the Basic Court concluded that: *"the Applicant was discriminated against with the procedure of the Municipal Directorate of Health and MFMC "Dr. Nexhat Çuni", which is contrary to Article 5 of the Law on Labor".*

19. The Municipal Directorate of Health in Mitrovica and MFMC "Dr. Nexhat Çuni" filed appeal with the Court of Appeals against Judgment C. No. 321/2014, of the Basic Court in Mitrovica, alleging violation of the provisions of the contested procedure, erroneous determination of factual situation and erroneous application of substantive law.

20. On 18 Septmber 2018, The Court of Appeals rendered Judgment Ac. No. 501/15, which approved as grounded the appeal of the Municipal Directorate of Health and MFMC "Dr. Nexhat Çuni". By the same Judgment, The Court of Appeal annulled the Judgment of the Basic Court and dismissed the Applicant's claim as ungrounded. In the reasoning of the Judgment, the Court of Appeals stated:

    a) *The first instance court of has erroneously applied the provisions of Article 5 of the Law on Labor, which provisions refer to the prohibition of all forms of discrimination....., the court of first instance reasoned that the failure to allow the claimant to sign an employment contract qualifies under the provisions referring to discrimination.*

    b) *The Court of Appeals has not accepted the legal position and conclusion of the first instance court that the actions of the respondent for annulment of the decision by which the claimant was selected qualify under the provisions referring to discrimination, because paragraph 1 of Article 5 of the Law on Labor states that: „Discrimination is prohibited in employment and occupation in respect of recruitment, training, promotion of employment, terms and conditions of employment, disciplinary measures, cancellation of the contract of employment or other matters arising out of the employment relationship and regulated by Law and other Laws into force", and that under this provision it does not follow that the actions of the respondent qualify as discriminatory.*

    c) *The abovementioned provision stipulates that discrimination is prohibited even when the employment contract is terminated, but in the present case the non-signing of the employment contract for the claimant cannot be qualified as discrimination, as the respondent has followed the regular procedure stipulated by its internal acts.*

21. The Applicant filed a request for revision with the Supreme Court against the Judgment C. No. 501/15, of the Court of Appeals, alleging essential violation of the provisions of the contested procedure, violation of the provisions of Article

31, paragraph 1 of the Constitution of the Republic of Kosovo, in conjunction with Article 6 of the ECHR.

22. On 5 December 2018, the Supreme Court rendered Judgment Rev. No. 387/2018, which rejected the Applicant's request for revision as ungrounded. In the reasoning of the decision, the Supreme Court stated:

> *"[…] the second instance court correctly applied the substantive law when it found that the claimant's statement of claim is unfounded. The court of second instance has rightly held that the respondent's actions do not qualify as discriminatory, as established in Article 5 .1 of the Law on Labor, as in the present case the non-signing of the employment contract for the claimant cannot qualify as discrimination.*
>
> *The revision claims of Applicant that the challenged judgment was rendered in essential violation of the provisions of the contested procedure provided by Article 182 par. 2 of the LCP, the Supreme Court of Kosovo found as ungrounded because the enacting clause of the challenged judgment is comprehensible, is not inconsistent with the reasoning and the case file, in the challenged judgment proper factual and legal reasons are given on all legally valid facts for fair adjudication of this legal matter, drawing conclusions which this Court fully approves*".

**Applicant's allegations**

23. The Court notes that the Applicant has two sets of allegations. The first group includes allegations related to the proceedings conducted in the municipal administration in Mitrovica, while the second group includes allegations related to the court proceedings conducted before the regular courts..

24. As regards the first set of allegations, the Applicant considers that by its actions "*The Municipality of Mitrovica has directly violated the rights guaranteed by Article 5, paragraph 1 of the Law on Labor, in conjunction with Article 24 of the Constitution - Equality Before the Law, as well as Article 1 par. 2 of Protocol Nr. 12 of the ECHR - prohibiting discrimination"*.

25. The Applicant further alleges that the Municipality of Mitrovica abused its rights in violation of Article 17 (Prohibition of abuse of rights) of the ECHR, thus violating Article 49 [Right to Work and Exercise Profession] of the Constitution.

26. As regards the second set of allegations, the Applicant first alleges that she is a victim of discrimination of the regular courts, because they did not take into account the statement made at the hearing by the lawyer N.Q., who described in detail the procedure for announcing the vacancy, as well as the course of the selection of candidates and the procedure for signing the contract.

27. The Applicant further considers that "*the violation of the constitutional provisions by the Court of Appeals exists due to the fact that this court unjustly finds that the first instance court incorrectly applied Article 5 paragraph 1 of the Law on Labor, and that the latter do not, in a single word,*

*reason their legal position, moreover, without any legal basis and legally grounded reasoning".*

28. The Applicant alleges that such a judgment of the Court of Appeals violates the rights and freedoms guaranteed by Article 31 paragraph 1 of the Constitution, in conjunction with Article 6 of the ECHR, as well as by Article 13 of the ECHR.

29. The Applicant considers that the Supreme Court of Kosovo did not consider the case according to the legal and constitutional provisions, and did not protect her rights to work and exercise profession. "*The Supreme Court in its decision denied her the right to work without any legal basis and legally grounded reasoning".*

30. In essence, the Applicant requests the Court to consider her Referral and find that her rights guaranteed by the Articles 24, 32 and 49 of the Constitution of Kosovo have been violated, as well as Articles 6, 13 17 and 1 (General prohibition of discrimination) paragraph 2 of Additional Protocol No. 12 of the ECHR. Accordingly, the judgment of the Supreme Court and the Court of Appeals must be annulled, and the judgment of the Basic Court in Mitrovica be declared fair and based on law.

**Admissibility of the Referral**

31. 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.

32. 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."*

33. In addition, the Court also refers to the admissibility requirements as defined 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 stipulate:

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... ."*

34. As to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party challenging an act of public authority, namely Judgment Rev. No. 387/2018 of the Supreme Court of 5 December 2018, after the exhaustion of all legal remedies. The Applicant has also clarified the rights and freedoms she claims to have been violated in accordance with the criteria of Article 48 of the Law and has submitted the Referral in accordance with the deadline set out in Article 49 of the Law.

35. In addition, the Court refers to Rule 39 [Admissibility Criteria] of the Rules of Procedure, which 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".*

36. Having regard to the Applicant's allegations, the Court finds that she essentially considers that her constitutional rights and the rights guaranteed by the ECHR have been violated by the Municipal Directorate in Mitrovica by the decision on the annulment of the vacancy in which she participated. In addition, the regular courts, namely the Court of Appeals and the Supreme Court, continued to violate her rights when rendering judgments on the annulment of the Judgment of the Basic Court in Mitrovica.

37. The Court, considering that the proceedings and actions of the municipal directorate in Mitrovica, as well as the decision to annul the vacancy, which were already the subject of judicial review, find it necessary in this case to deal only with the decisions of the regular courts, which the Applicant relates to the violation of her rights guaranteed by Article 24 [Equality Before the Law], Article 31 paragraph 1 [Right to Fair and Impartial Trial], Article 49 paragraph 1 [Right to Work and the Exercise of Profession] of the Constitution and the rights and freedoms guaranteed by Article 6 paragraph 1 (Right to a fair trial), Article 13 paragraph 1 (Right to an effective remedy), Article 17 paragraph 1 (Prohibition of abuse of rights) and Article 1 (General prohibition of discrimination) paragraph 2 of Additional Protocol No. 12 of the ECHR.

38. The Court notes that the Applicant raised several allegations regarding the violation of certain Articles of the Constitution and Articles of the ECHR, however, the Court also finds that in essence all those allegations of a violation of the Constitution and the ECHR result from the fact that she considers that she had no fair trial. Consequently, the Court in the following will first examine the Applicant's allegation of a violation of the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, and then any other allegations that may result from a violation of this right.

***Allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR***

39. Having regard to the Applicant's allegations, the Court notes that she considers that there was no fair trial due to the fact that she could not exercise her rights during the court proceedings, since, first, the Court of Appeals and later the Supreme Court incorrectly applied/interpreted Article 5 paragraph 1 of the Law on Labor.

40. In this regard, the Court notes, first of all, that the proceedings at issue relate to the determination of the Applicant's civil rights, more specifically the right to work in the statement of claim filed with the Municipal Court in Mitrovica. Therefore, in the present case, it is about a case of a civil-legal nature, from which it follows that Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR can be applied.

41. The Court recalls that Article 31 [Right to Fair and Impartial Trial] of the Constitution in the relevant part reads:

> *"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers".*

42. The Court also recalls Article 6 [Right to a fair trial] of the ECHR, which in the relevant part reads:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*

43. Taking into account the Applicant's allegations of erroneous determination of factual situation and erroneous application of substantive law, specifically Article 5 paragraph 1 of the Law on Labor, yhe Court notes that it is as a general rule that the allegations of erroneous interpretation of the provisions of law allegedly made by the regular courts in the present case of Article 5 paragraph 1 of the Law on Labor, relate to the scope of legality and as such do not fall within the jurisdiction of the Constitutional Court, and, therefore, in principle, cannot be considered by the Court. (See: case No. KI06/17, Applicant *L.G. and five others*, Resolution on Inadmissibility of 25 October 2016,

paragraph 36; and case KI122/16, Applicant *Riza Dembogaj*, Judgment of 30 May 2018, paragraph 56).

44. The Court has consistently reiterated 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 procedural and substantive law (See ECtHR case, *García Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28; and see, also cases of the Court KI70/11, Applicant: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011, paragraph 29; KI06/17, Applicant: *L.G. and five others*, cited above, paragraph 37; and KI122/16, cited above, paragraph 57).

45. The Court has consistently held this view based on the ECtHR case law, which clearly states that it is not the role of this Court to review the findings of the regular courts as to the factual state and the application of substantive law (see ECtHR case *Pronina v. Russia*, Judgment of 30 June 2005, paragraph 24; and the Court cases KI06/17, Applicant: *L.G. and five others*, cited above, paragraph 38; and KI122/16, cited above, paragraph 58).

46. However, the Court emphasizes that the case law of the ECtHR and of the Court also determines the circumstances under which exceptions to this paragraph are to be made. The ECtHR emphasized that while it primarily pertains to the domestic authorities, that is, the courts, to resolve problems of interpretation of the legislation, the role of the Court is to make sure or verify that the effects of this interpretation are compatible with the ECHR (see the ECtHR case *Miragall Escolano and Others v. Spain,* Judgment of 25 May 2000, paragraphs 33-39).

47. Therefore, although the role of the Court is limited in terms of the assessment of the interpretation of the law, it must make sure and take action when it notices that a particular court has *"applied the law in an obviously arbitrary manner"* which in the concrete, could have resulted in *"arbitrary"* or "*manifestly unreasonable"* conclusions for the Applicant(See, in this regard, ECtHR cases *Anheuser-Busch Inc. v. Portugal*, Judgment of 11 January 2007, paragraph 83; and see also the cases of Court KI06/17, Applicant *LG and five others*, cited above, paragraph 40; KI122/16, cited above, paragraph 59).

48. Bringing the Applicant's allegations in relation to the present case, the Court finds that the Applicant has initiated the contested procedure with the Basic Court regarding the decision of the Municipal Administration in Mitrovica, which annulled the vacancy for admission in the employment service. The Court also finds that the Basic Court annulled that decision of the municipal administration by concluding "*that it was contrary to Article 5 paragraph 1 of the Law on Labor"*.

49. In this respect, the Court finds that Article 5 paragraph 1 of the Law on Labor regulates the issue of the Prohibition of Discrimination in Employment, which states:

> *"1. Discrimination is prohibited in employment and occupation in respect of recruitment, training, promotion of employment, terms and conditions of employment, disciplinary measures, cancellation of the contract of employment or other matters arising out of the employment relationship and regulated by Law and other Laws into force".*

50. In this regard, the Court notes that in the appeal proceedings the Court of Appeals, having examined the allegations, concluded that the Basic Court has erroneously applied the provision of Article 5 paragraph 1 of the Law on Labor, concerning the prohibition of all kinds of discrimination. The Court of Appeals concluded that "*Based on the factual situation found in the probationary procedure described above, namely, as in the reasoning of the challenged judgment, the first instance court reasoned that failure to enable claimant to sign the employment contract qualifies under the provisions referring to discrimination".*

51. However, the Court also notes that the Court of Appeals in the Judgment also gave a specific explanation as to why it considers that the Basic Court has erroneously applied Article 5 paragraph 1 of the Law on Labor, finding that "*The abovementioned provision stipulates that discrimination is prohibited even when the employment contract is terminated, but in the present case, the non-signing of the employment contract for the claimant cannot be qualified as discrimination, as the respondent has followed the regular procedure stipulated by its internal acts".*

52. Moreover, from the case file and the judgment of the Court of Appeals, the Court finds that the Court of Appeals concluded that the Applicant was not a victim of discrimination on the grounds that she had never signed the employment contract with the respondent and, consequently, she had not established an employment relationship. Consequently, discrimination as such could not have occurred because the mere act of non-signing of the contract itself does not produce legal effects nor obligations between the two parties in the future.

53. With regard to the proceedings before the Supreme Court, the Court further notes that in the revision proceedings, it dealt with all of the Applicant's appealing allegations, and gave its reasoning for each of the appealing allegation.

54. The Court notes in particular the fact that the Supreme Court also dealt with the Applicant's appealing allegations regarding the allegations that the Municipal Directorate abused its rights, which was in violation of Article 17 of the ECHR and that, as a result, there has been an open and direct discrimination, which is contrary to Article 5.1 of the Law on Labor and Article 1.2 of Protocol No. 12 of the ECHR, the Supreme Court concluded that *„ the respondent's actions do not qualify as discriminatory, as the latter acted by applying the regular procedure of its internal acts, which right belongs to the*

*respondent regarding the selection of the candidate respecting the recruitment procedure based on the administrative instruction".*

55. Moreover, the Court finds that the Supreme Court also dealt with the Applicant's appealing allegation in relation to the statement made by the lawyer during the hearing, which, according to her allegations, the courts did not take into consideration. In this regard, the Supreme Court concluded: "*other allegations of the revision, regarding the statement of the MFMC lawyer given at the hearing of 16.12.2018, …* […] *regarding the determination of factual situation for which under Article 214 paragraph 2 of the LCP, the revision cannot be filed*".

56. In the light of the foregoing, the Court finds that it has not found anything that would indicate in the present case that the material-legal provisions in the present case were applied in an arbitrary or unfair manner to the detriment of the Applicant. The Court also considers that the Applicant does not provide facts that could justify the allegation that there has been a violation of the constitutional rights she invokes, therefore there are no *prima facie* elements that a violation of Article 31 of the Constitution in conjunction with Article 6 paragraph 1 of the ECHR is possible, thus a review of merits would be necessary.

***Allegations of violation of Article 49 paragraph 1 of the Constitution***

57. The Court notes that the Applicant alleges that her rights guaranteed by Article 49 of the Constitution have been violated due to the fact that the courts have not annulled the decision of the Municipal Directorate in Mitrovica to cancel the job vacancy, thus preventing her from work.

58. The Court notes that Article 49 [Right to Work and Exercise Profession] of the Constitution reads:

> *"1. The right to work is guaranteed.*
> *2. Every person is free to choose his/her profession and occupation"*

59. In this regard, the Court finds that the provision of Article 49 of the Constitution provides **i)** the right of every person to be able to work and **ii)** the right that every person, in accordance with his or her free will, desire, qualification, ability, can freely choose a profession and a job.

60. The Court wishes in particular to emphasize that Article 49 of the Constitution does not guarantee to anyone the right to work and the right of a person to work in a specific job position.

61. The Court, relating the Applicant's allegations with the reasoning of the challenged decisions of the Court of Appeals and the Supreme Court, finds that the competent authority has announced and subsequently annulled the vacancy in accordance with its rules of procedure, meaning the Applicant had never signed an employment contract, and therefore had not established her employment relationship with the respondent. Therefore, the rights which she

claims to have been violated, as such, could not have arisen in the legal sense. The rights and obligations of the employee and the employer arise only after the employment contract is signed, where the provisions of the Law on Labor are applied.

62. In addition, the Court finds from the case file that the Municipal Directorate in Mitrovica announced again the vacancy for the same position, it is concluded that the Applicant at any time during the duration of the vacancy was able to apply in the same vacancy, and that there was no decision of the administrative or judicial authority prohibiting her repeated application in the open vacancy.

63. In this respect, the Court finds that the Applicant's allegations of a violation of Article 49 of the Constitution are ungrounded.

***Allegations of violation of Article 24 of the Constitution in conjunction with Article 14, and Article 1, paragraph 2 of the Additional Protocol No. 12 of the ECHR***

64. The Court notes that the Applicant alleges that she was discriminated against because the Court of Appeals and the Supreme Court annulled the Judgment of the Basic Court which concluded that the decision of the Municipal Directorate in Mitrovica was discriminatory. It follows that discrimination against her continues with the decisions of the regular courts.

65. Therefore, the Court considers that the Applicant complains of a violation of the right to non-discrimination under Article 24 of the Constitution, Article 14 of the ECHR, and Article 1, paragraph 2 of Protocol No. 12 of the ECHR regarding the right to fair and impartial trial under Article 31 and Article 6 of the ECHR.

66. In this regard, the Court recalls that Article 24 [Equality Before the Law] of the Constitution in the relevant part states:

> *"1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.*
>
> *2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.*
> *[...]*

67. The Court also recalls Article 14 (Prohibition of discrimination) of the ECHR, which in the relevant part reads:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".*

68. The Court recalls that, according to ECtHR case law, the right to non-discrimination under Article 14 of the ECHR is an accessory right. This means that this article does not guarantee an independent and autonomous right to non-discrimination, but discrimination, under this article can only be invoked in relation to the "*enjoyment of the rights and freedoms guaranteed by the ECHR*". Although the finding of a violation of one of the guaranteed rights is not a prerequisite for the application of Article 14 of the ECHR, however, this Article will not be applicable unless the facts of a particular case fall "within the scope" of the guaranteed right (see ECtHR judgment, *Karlheinz Schmidt v. Germany*, Judgment of 18 July 1994, Series A No. 291-B, paragraph 22).

69. In the present case, the Court has already concluded that the Applicant's right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR has not been violated, which is why her allegations do not fall within the scope of these Articles, so that Article 14 of the ECHR cannot be applied.

70. In addition, the Court recalls that the Supreme Court, in a separate part of its judgment, paid special attention to this issue, concluding that her allegations of discrimination were ungrounded.

***Allegations of violation of Article 32 of the Constitution and Article 13 of the ECHR***

71. As to the Applicant's allegations that the right under Article 32 of the Constitution and Article 13 of the ECHR during the court proceedings has been violated, the Court recalls that Article 32 [Right to Legal Remedies] of the Constitution in the relevant part states:

> *"Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law".*

72. Article 13 (Right to an effective remedy) of the ECHR also in the relevant part reads:

> *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".*

73. As regards the allegations of violation of Article 32 of the Constitution and Article 13 of the ECHR, the Court recalls that the efficacy/ effectiveness of the legal remedies in accordance with the ECtHR case law is not determined on the basis of whether the Applicant has succeeded in achieving his goals the way he wanted by its use, but whether he had the possibility that in the legal remedy he used he could present his arguments to be considered by the competent authorities (see ECtHR judgment *Soering v. the United Kingdom* Series A No. 161, of 7 July 1989, paragraph 120).

74. Having regard to the facts of the present case, that the Applicant used all the legal remedies provided by law before the administrative authorities of the Municipality of Mitrovica and during the regular court proceedings, lead to the conclusion that her allegations of violation of Article 32 of the Constitution and Article 13 of the ECHR are ungrounded.

75. Based on the above, the Court reiterates that it is the Applicant's obligation to substantiate her constitutional allegations and to submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (see: case of the Constitutional Court No. KI19/14 and KI21/14, Applicants: *Tafil Qorri and Mehdi Syla*, Resolution on Inadmissibility of 5 December 2013).

76. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and, is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

**FOR THESE REASONS**

The Constitutional Court of Kosovo in accordance with Article 113.1 and 7 of the Constitution, Article 20 of the Law and Rule 39 (2) 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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