



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

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Prishtina, on 22 April 2021  
Ref.no.:RK 1754/21

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

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI145/20**

Applicant

**Hafize Gashi**

**Constitutional review of Decision Rev.no.244/2020 of the Supreme  
Court of Kosovo, of 27 July 2020**

**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 Hafize Gashi, residing in Prishtina (hereinafter: the Applicant).

## **Challenged decision**

2. The Applicant is requesting the constitutional review of Decision [Rev.no.244/2020] of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 27 July 2020, in conjunction with the Decision [Ac.no.265/2015] of the Court of Appeals of Kosovo, of 20 August 2020.

## **Subject matter**

3. The subject matter of the Referral is the constitutional review of the challenged decision, which allegedly has violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo ( hereinafter: the Constitution).

## **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 30 September 2020, the Applicant submitted the Referral by mail to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 12 October 2020, 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 (members).
7. On 21 October 2020, the Court notified the Applicant about the registration of the Referral. On the same day the Court sent a copy of the Referral to the Supreme Court.
8. On 26 March 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

## **Summary of facts**

9. Based on case file, it results that Xh.G. (Applicant's spouse) had been employed by the Kosovo Electricity Company, and the latter, by Decision [no. 2517] of 22 October 1990, had terminated the employment relationship of XH.G. On an unspecified date, XH.G. had filed a claim with the Court of Associated Labour, which in the meantime had ceased to exist and its powers had been transferred to the Municipal Court in Prishtina, which by the Judgment [P1.No.237/92] had rejected his statement of claim. Xh.G. had filed an appeal against the aforementioned Judgment at the District Court, and the latter by the Decision

[Gž.no.496/93], had approved the appeal of Xh.G. and remanded the case for reconsideration to the Municipal Court in Prishtina. The Municipal Court in Prishtina had not been able to decide on the case in the years 90/99.

10. On 28 March 2003, the case file was reconstructed by the Municipal Court in Prishtina, and the case was given a new number, respectively the number [C.no.173/03].
11. On an unspecified date, Xh.G. had filed an appeal with the District Court in Prishtina, against the decision to allow the reconstruction of the case file.
12. On 27 October 2008, the District Court in Prishtina, by Decision [Ac.no.129/2007], dismissed the appeal as inadmissible [clarification: this decision is not contained in the case file].
13. On 5 July 2010, Xh.G. had passed away and upon the completion of the probate proceedings, by Decision [T.no.701 / 12] of the Municipal Court in Prishtina, the Applicant was declared as the sole heiress of Xh.G.
14. On 24 January 2014, the Applicant requested the continuation of the procedure, claiming that she has a legal interest to continue with the proceedings, for ascertaining that the decision to dismiss Xh.G. was unlawful and at the same time after the confirmation that the decision to dismiss was unlawful, the Applicant to acquire the monthly salaries of Xh.G.
15. On 24 November 2014, the Basic Court in Prishtina, by Decision [C1.no.173/2003] decided to terminate the proceedings in this case since the rights that are requested by the Applicant cannot be inherited. The Basic Court in Prishtina in its reasoning stated that *“On the basis of the case file, the Court found that the subject matter of this dispute are the rights that cannot be passed to the successors of the party by referring to the legal provisions specifically Article 282, para.1 of the Law on Contested Procedure.”*
16. On 3 December 2014, the Applicant filed an appeal with the Court of Appeals, against the above-mentioned Decision of the Basic Court in Prishtina, alleging violations of the provisions of the Law on Contested Procedure, erroneous application of substantive law, requesting that the case be remanded for reconsideration.
17. On 20 August 2019, the Court of Appeals by Decision [CA.nr.265/2015] rejected the appeal as ungrounded, and confirmed the Decision [C1.nr.173 / 2003] of the Basic Court in Prishtina, of 24 November 2014. The Court of Appeals in its reasoning further stated that *“The right to conduct proceedings is a subjective right, and as such it is not inherited. The situation would have been different when by a decision of the court, or with another act it would have been confirmed that the claimants’ employment relationship was terminated in unlawful manner, thus the heirs would have had the right to continue with the proceedings for compensation of unpaid salaries, namely the damages due to unlawful dismissal because in that case, it would be a fair matter that is suitable for inheritance, and as such it is passed to the heirs. The comparison in the appeal of the specific situation, and the situation*

*with the payment of debts and unpaid pensions is a reckless cause of a completely different legal situation. In a situation where the right to pensions has been established, that right has already been established, and where he simply demands the payment of a certain pension from the day of the decedent's death”.*

18. On 25 February 2020, the Applicant had filed a revision with the Supreme Court, against the aforementioned Decision of the Court of Appeals, alleging violations of the provisions of the Law on Contested Procedure, erroneous application of substantive law, requesting that the case be remanded for reconsideration.
19. On 27 July 2020, the Supreme Court by Decision [Rev.no.244/2020] rejected the Applicant's revision as ungrounded. The Supreme Court by its Decision considers that the Decision of the Court of Appeals is fair, clear and convincing and it does not contain essential violations of the provisions of the Law on Contested Procedure.

### **Applicant's allegations**

20. The Court recalls that the Applicant alleges that the challenged Decision has violated her rights protected by Article 31 [Right to Fair and Impartial Trial] paragraph 1 and 2 of the Constitution.
21. The Applicant alleges that *“the claimant’s right to proceedings was rejected by an erroneous interpretation of the law. The right to equality in parallel with equal treatment, or the principle of non-discrimination conditions the interpretation and application of the right stricto sensu. The principle of equality in the first place means that no person should be discriminated against even in the way how the law is applied to him.”*
22. Specifically, the Applicant states that *“the claimant considers that the interpretation of the law in her case is discriminatory”.*
23. Finally, the Applicant requests from the Court *to find that there is a violation of Article 31, paragraphs 1 and 2 as well as to annul the challenged decision.*

### **Relevant legal provisions**

LAW No. 03/L-006 ON CONTESTED PROCEDURE

#### *Article 282*

*282.1 Court recess is caused when the party dies, or size to exist, or when the objects of contest are the rights that cannot be passed to the successors of the party, respectively to party’s judicial successor.*

*282.2 In the cases of the parag.1 of this article, the verdict for the court recess is sent to the opposing party, successors, respectively judicial successor of the party after they are set.*

## LAW 04/l-077 ON OBLIGATIONAL RELATIONSHIPS

### Article 204

#### *Obligations of manager without mandate*

*1. A manager without mandate must where possible immediately notify the person whose transaction is being conducted regarding the former's action, and must continue the transaction insofar as is reasonably possible until the latter is able to take over attendance thereto.*

*2. After a transaction is completed the manager without mandate must give accountability and to transfer everything that was acquired through the transaction to the person whose transaction was conducted.*

*3. Unless stipulated otherwise by law the manager without mandate shall have the obligations of a mandatory.*

### **Assessment of the admissibility of Referral**

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

25. 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".*

26. The Court further refers to Articles 47 [Individual Requests], Article 48 [Accuracy of the Referral] and Article 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...”*

27. As to the fulfilment of these requirements, the Court finds that the Applicant is an authorized party, who is challenging an act of a public authority, namely the Decision [Rev.no.244/2020] of the Supreme Court, of 27 July 2020, in conjunction with Decision [Ac.no.265/2015] of the Court of Appeals, of 20 August 2019, after having exhausted all legal remedies. The Applicant has clarified the rights and freedoms for which she claims to have been violated as well as has submitted the Referral within the legal deadline.
28. In addition to these criteria, the Court also refers to 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.”*
29. In the context of the assessment of the admissibility of the Referral, namely, in the assessment whether the Referral is manifestly ill-founded on constitutional basis, the Court will first recall the essence of the case contained in this Referral and the respective allegations of the Applicant, in the assessment of which, the Court will apply the standards of case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.
30. The Court initially recalls that Xh.G. the Applicant's husband had been employed by the Kosovo Electricity Company, and that the latter on 22 October 1990 had terminated the employment relationship of XH.G. Following a claim filed with the Municipal Court in Prishtina by XH.G. against the Decision on the termination of employment relationship, the Municipal Court by Judgment [P1.No.237/92] had rejected his claim. Subsequently, Xh.G. had filed an appeal against the above Judgment, with the District Court in Prishtina, and the latter by Decision [Gž.no.496/93], had approved the appeal of Xh.G. by remanding the case for reconsideration to the Municipal Court in Prishtina. The Municipal

Court in Prishtina did not have the opportunity to decide on the case in the years 90/99. Later in 2003, the Municipal Court in Prishtina had allowed the reconstruction of the case file. In 2010, Xh.G. had passed away. The Applicant, acting in her capacity as heiress, had initiated the proceedings in the Basic Court in Prishtina, to ascertain that the Decision to dismiss Xh.G. from work was unlawful and at the same time she had filed a claim for compensation of salaries. The Basic Court in Prishtina by Decision[C1.no.173/2003] had decided to terminate the proceedings in this case as the rights requested by the Applicant cannot be inherited. The decision of the Municipal Court was confirmed by the Court of Appeals and the Supreme Court.

31. The Applicant challenges these findings before the Court, by alleging violations of Article 31 of the Constitution and stating that the Supreme Court by the challenged decision, which confirmed the decisions of the lower instances, whereby the proceedings in this legal matter were terminated, by calling upon Article 282 of the Law on Contested Procedure, had applied the legal provisions in an erroneous manner to the detriment of the Applicant.
32. In examining these allegations, the Court notes that in essence, they relate to the erroneous application of the applicable law by the Supreme Court, allegations which the Court, pursuant to its case-law and that of the ECtHR, considers as “*fourth instance claims*.”
33. In the context of this category of claims, the Court emphasizes that based on the case law of the ECtHR, but also taking into account its peculiarities, as are determined through the ECHR, the principle of subsidiarity and the doctrine of the fourth instance, it has consistently emphasized the difference between “constitutionality” and “legality” and has asserted that it is not its duty to deal with errors of facts or erroneous interpretation and application of the law, which allegedly has been committed by a regular court, unless and in so far as such errors may have infringed the rights and freedoms protected by the Constitution and/or the ECHR. (See, in this context, *inter alia*, the cases of Court KI179/18, Applicant *Belgjyzar Latifi*, Resolution on Inadmissibility of 23 July 2020, paragraph 68; KI49/19, Applicant *Limak Kosovo Joint Stock Company International Airport JSC, “Adem Jashari”*, Resolution of 31 October 2019, paragraph 47; KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 35; and KI154/17 and KI05/18, Applicants, *Basri Deva, Afërdita Deva and the Limited Liability Company “Barbas”*, Resolution on Inadmissibility, of 12 August 2019, paragraph 60).
34. The Court has also consistently reiterated that it is not the role of this Court to review the conclusions of the regular courts in respect of the factual situation and the application of substantive law and that it cannot assess the facts which have led a regular court to adopt one decision rather than another. Otherwise, the Court would act as a court of “fourth instance”, which would result in exceeding the limits imposed on its jurisdiction. (See, in this context, the case of the ECtHR *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28 and references used therein; and see also the cases of the Court, KI49/19, cited above, paragraph 48; and KI154/17 and KI05/18, cited above, paragraph 61).

35. The Court, however, emphasizes that the case law of the ECtHR and of the Court also provides for the circumstances under which exceptions to this stance should be made. As noted above, while it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of the applicable law, the role of the Court is to verify whether the effects of such interpretation are compatible with the Constitution and the ECHR. (See, the ECtHR case, *Miragall Escolano and others v. Spain*, Judgment of 25 May 2000, paragraphs 33-39; and see also the case of the Court KI154/17 and KI05/18, cited above, paragraph 63). In principle, such an exception relates to cases which result to be apparently arbitrary, including those in which a court has “*applied the law manifestly erroneously*” in a particular case and which may have resulted in “*arbitrary conclusions*” or “*manifestly unreasonable*” for the respective Applicant. (For a more detailed explanation regarding the concept of “*application of law in a manifestly erroneous manner*”, see, inter alia, ECtHR Guide on Article 6 of the ECHR (civil limb), of 31 August 2020, part IV. Procedural requirements; 3. Fourth instance; b. Scope and limits of the Court's supervision, paragraphs 329-333; and the case of Court KI154/17 and KI05/18, cited above, paragraphs 60 to 65 and references used therein).
36. In this context, the Court recalls that in the circumstances of the present case, the Applicant's main allegations relate to the erroneous interpretation of Article 282 of the Law on Contested Procedure by the Supreme Court. In essence, the Applicant alleges that in the present case the proceedings should have not been terminated, given the fact that the Applicant is the sole heir of Xh.G. and that she had an interest in this legal matter. The Applicant did not further elaborate on how the Law on Contested Procedure was erroneously applied.
37. The Court notes, however, that the Supreme Court had treated the Applicant's submission, and based on Article 282 of the Law on Contested Procedure and Article 204 of the Law on Obligational Relationships, had rejected it. The Court recalls once again the reasoning of the Decision [Rev.no.244/2020] wherein is stated as follows:

*“According to the assessment of the Supreme Court of Kosovo, the court of the first instance has correctly applied the substantive law when terminating the procedure due to the death of the claimant and for the fact that the subject of dispute are the rights that can not be transferred to the heirs of the party respectively to its legal successors. The challenged decision does not contain violations of the essential character of the provisions of the Law on Contested Procedure which this court assesses ex officio. The claimant's authorized representative now acting on behalf of the claimant's descendants alleges that the court has unlawfully disregarded the statement of claim and decided on the proceedings by terminating the same. The revision allegation that the court of the second instance should have obliged the court of the first instance to continue with the proceedings for compensation of salaries because they should be enjoyed by the descendants is not based upon the law, because the personal income from the employment relationship cannot be passed to the descendants*

*unless they have been confirmed by a final judgment, whilst in the present case those incomes have not been confirmed as such in conformity with Article 204 of the LCT. In the claimant's revision are generally reiterated the statements presented in the appeal against the decision of the court of the second instance for which the court has given appropriate, convincing and sufficient reasons, which are acceptable also for the revision court. Also according to the assessment of the revision court, the court of the second instance has correctly assessed the position that the challenged decision does not contain essential violations of the provisions of the LCP and that the substantive law was correctly applied.”*

38. In this respect, the Court considers that the Supreme Court, through the challenged decision which confirmed the decisions of the lower instances, in the circumstances of the present case, had treated and reasoned the Applicant's allegations, including those relating to the erroneous interpretation of the provisions of the Law on Contested Procedure. Moreover, the Court finds that the Supreme Court has clearly stated that pursuant to Article 204 of the Law on Obligational Relationships, personal income from employment relationship cannot be passed to descendants, unless they have been confirmed by a final judgment, whilst in the present case those incomes have not been confirmed as such.
39. In such circumstances, taking into account the allegations made by the Applicant and the facts presented by her, as well as the reasonings of the regular courts elaborated above, the Court considers that the Applicant does not sufficiently prove or substantiate her allegation that the regular courts may “*have applied the law in a manifestly erroneous manner*”, resulting in “*arbitrary conclusions*” or “*manifestly unreasonable*” for the Applicant, and consequently her allegations for erroneous interpretation and application of the applicable law, qualify as claims falling within the category of “*fourth instance*” and as such, reflect claims at the level of “*legality*” and are not argued at the level of “*constitutionality*”. Consequently, they are manifestly ill founded on constitutional basis, as provided for by paragraph (2) of Rule 39 of the Rules of Procedure.
40. In this regard, in order to avoid misunderstandings on the part of the applicants, it should be borne in mind that the “*fairness*” required by Article 31 of the Constitution in conjunction with Article 6 of the ECHR is not “*substantive*” fairness, but “*procedural*” fairness. In practical terms, and in principle, this is expressed through the adversarial proceedings, in which the parties are heard and placed on an equal footing before the court. (see, *inter alia*, the case of the Court, KI131/19, Applicant Sylë Hoxha, Resolution on Inadmissibility of 21 April 2020, paragraph 57; and KI49/19, cited above, paragraph 55).
41. More precisely, this implies that the parties in a course of a fair and impartial trial should: (i) be afforded a conduct of procedure based on adversarial principle; (ii) be able to adduce the arguments and evidence they consider relevant to their case at the various stages of those proceedings; (iii) be guaranteed that all the arguments, viewed objectively, relevant for the

resolution of their case were heard and reviewed by the regular courts; (iv) be guaranteed that the factual and legal reasons against the challenged decisions were examined and reasoned in detail; and that, according to the circumstances of the case, (v) be guaranteed that the proceedings, viewed in entirety, were fair and not arbitrary (See, *inter alia*, the case of the ECtHR *Garcia Ruiz v. Spain*, cited above, paragraph 29; and the case of Court, KI131/19, cited above, paragraph 58). The Court states that, in the circumstances of the present case, the Applicant has failed to provide arguments that this has not been done in this case.

42. The Court also reiterates that Article 31 of the Constitution in conjunction with Article 6 of the ECHR, does not guarantee anyone a favorable outcome in the course of a judicial proceeding, nor does it provide for the Court to question the application of substantive law by the regular courts in a civil dispute, where mainly one of the parties wins and the other one loses (see, *inter alia*, the cases of the Court, KI118/17, Applicant *Şani Kervan and others*, Resolution on Inadmissibility of 17 January 2018, paragraph 36; KI49/19, cited above, paragraph 54, and KI99/19, Applicant *Persa Raičević*, Resolution on Inadmissibility of 19 December 2019, paragraph 48).
43. Finally, the Court also notes that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts cannot in itself raise an arguable allegation for a violation of the fundamental rights and freedoms guaranteed by the Constitution (see, the case of the ECtHR, *Mezotur-Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).
44. In conclusion, pursuant to Rule 39 (2) of the Rules of Procedure, the Referral is manifestly ill-founded on constitutional basis and, consequently, inadmissible.

## FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, pursuant to Article 113.1 and 113.7 of the Constitution, and Rule 39 (2) of the Rules of Procedure, on 26 March 2021, 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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