



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

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Prishtina, 9 June 2017  
Ref. No.:RK 1087/17

## **RESOLUTION ON INADMISSIBILITY**

in

**Case KI112/16**

Applicant

**N.T.SH. "LOKI"**

**Constitutional review of Judgment Rev. no. 110/16 of the Supreme Court  
of Kosovo, of 7 June 2016**

### **THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of

Arta Rama-Hajrizi, President  
Ivan Čukalović, Deputy President  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge  
Bekim Sejdiu, Judge  
Selvete Gërxhaliu-Krasniqi, Judge and  
Gresa Caka-Nimani, Judge.

#### **Applicant**

1. The Referral was submitted by N.T.SH. "LOKI" from Prizren (hereinafter: the Applicant) represented by the Law Firm "Sejdiu & Qerkini" from Prishtina

## **Challenged decision**

2. The Applicant requests constitutional review of Judgment Rev. no. 110/16 of the Supreme Court, of 7 June 2016.
3. The Applicant claims that he received the abovementioned Judgment on 21 July 2016.

## **Subject matter**

4. The subject matter is the constitutional review of the challenged Judgment, which allegedly violated the Applicant's right, as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR).

## **Legal basis**

5. The Referral is based on Articles 21.4 and 113.7 of the Constitution and Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Proceedings before the Court**

6. On 8 September 2016 the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 18 October 2016 the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi (Judges).
8. On 12 January 2017 the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Supreme Court and the Municipality of Prizren.
9. On 12 January 2017 the Court requested from the Basic Court in Prizren information (or relevant proof) whether the Applicant was notified of the request for revision filed by the Municipality of Prizren.
10. On 3 February 2017 the Basic Court in Prizren informed the Court that they were not able to provide the information requested by the Court because the whole case file was at the Office of Chief State Prosecutor.
11. On 28 February 2017 the Basic Court in Prizren submitted to the Court a proof, namely a return receipt, showing that the notification of the request for revision to the Supreme Court was served on the authorized representative (lawyer) of the Applicant on 8 April 2016.

12. On 8 May 2017, 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**

13. On 1 August 2001 the Applicant signed a concession contract with the Municipality of Prizren for a ten-year period, on the basis of which the Applicant was granted the right to use the Dairy Market in Prizren (hereinafter: the Dairy Market).
14. On 12 February 2003 the Municipality of Prizren annulled the above concession contract and as a consequence it closed the premises of Dairy Market. According to the case file, the Chief Executive Officer of the Municipality of Prizren justified his Decision to terminate the contract with the fact that the Applicant had not complied with concession contract.
15. On 17 June 2003 the Applicant filed a claim with the Municipal Court in Prizren. In his claim, the Applicant requested compensation of the material damage due to the unilateral termination of the concession contract, in the name of the funds invested in the Dairy Market.
16. On 5 April 2004 the Municipal Court in Prizren (Judgment C.no.384/03) approved the Applicant's claim, in its entirety, and obliged the Municipality of Prizren to compensate the Applicant a certain amount of money in the name of the invested funds. The Municipal Court, in its Judgment, established that as a consequence of the unilateral termination of the concession contract, the Applicant suffered a material damage because he was prevented from using the markets until the expiry of the contract.
17. On 2 December 2004 the Municipality of Prizren filed an appeal with the District Court in Prizren against the Judgment of the Municipal Court of 5 April 2004.
18. On 18 March 2005 the District Court in Prizren (Decision Ac.no.431/2004) approved the appeal of the Municipality of Prizren, whereby it remanded the case to the first instance court for retrial. The District Court found that the Judgment of the Municipal Court in Prizren contained violations of the provisions of procedural law and that *"these violations consists to the fact that the challenged Judgment does not contain reasons on decisive facts and the contradiction exists between the reasons provided in the Judgment and the content of case files."*
19. On 7 June 2005 the Municipal Court in Prizren approved in its entirety (Judgment C.no.229/05) the Applicant's claim as grounded.
20. On 13 December 2005 the Municipality of Prizren filed an appeal with the District Court in Prizren against the Judgment of the Municipal Court of 7 June 2005.

21. On 7 April 2006 the District Court in Prizren (Decision Ac.no.540/2005) approved the appeal of the Municipality of Prizren, whereby it quashed the Judgment of the Municipal Court in Prizren and remanded the case for retrial and reconsideration.
22. On 13 December 2006 the Municipal Court in Prizren approved in its entirety (Judgment P.no.398/06) the Applicant's claim as grounded.
23. On 25 May 2007 the Municipality of Prizren filed an appeal with the District Court in Prizren against the Judgment of the Municipal Court in Prizren.
24. On 9 June 2008 the District Court in Prizren (Decision Ac.no.260/07) approved the appeal of the Municipality of Prizren, thereby quashing the case, in its entirety, and remanding the case for retrial.
25. On 11 February 2010 the Municipal Court in Prizren approved in its entirety (Judgment P.no.406/08) the Applicant's claim as grounded.
26. On 22 July 2010 the Municipality of Prizren filed an appeal with the District Court in Prizren against the Judgment of the Municipal Court in Prizren.
27. On 11 May 2012 the District Court in Prizren (Decision Ac.no.368/2010) approved the appeal of the Municipality of Prizren, thereby quashing the first instance judgment, in its entirety, and remanding the case for retrial.
28. On 14 June 2012 the Municipal Court in Prizren filed a request with the Supreme Court for determination of the subject matter competence. In its request, the Municipal Court in Prizren claimed that the District Court in Prizren was competent to decide on the request of the parties, because the first instance Judgment had been quashed more than twice.
29. On 6 August 2012 the Supreme Court of Kosovo (Decision, Cn.no.9/2012) decided that the Municipal Court in Prizren had subject matter competence in this contentious matter.
30. On 22 November 2012 the Municipal Court in Prizren approved in its entirety (Judgment P.no.398/12) the Applicant's claim as grounded and held as follows: I. It obliged the Municipality of Prizren to pay the Applicant a certain amount of money for the invested funds; II. It rejected as ungrounded the counterclaim of the Municipality of Prizren for compensation due to Applicant's failure to fulfill the contractual obligations, and III. It obliged the Municipality of Prizren to compensate the Applicant for the procedural expenses.
31. The Municipal Court in Prizren assessed that, *"From the evidences presented, it appears that between litigants there is no dispute as to the fact that they have [terminated] a contract for concession; it is disputed the fact whether the unilateral termination of the contract caused damage to the claimant, since he had invested in fixing the market space and equipping it.*

32. Further, the Municipal Court concluded that, “According to Article 132 of LOR [Law on Obligations], when the contract is terminated, both parties are released of their obligations, except for the obligation for compensation of damage. With the termination of the contract, each party owes the other party compensation for the use that in meantime it has had, from what is required to return, respectively, compensate, while with the termination of the contract, the party which did comply with the contract, in whole or in part, has the right to be reimbursed what it has spent. In this case, the claimant has invested its own funds, and the respondent cannot deny, and therefore, it is entitled to the compensation of the same funds.
33. On an unspecified date, against the Judgment of the Municipal Court in Prizren of 22 November 2012, the Municipality of Prizren filed an appeal with the Courts of Appeals.
34. On 11 December 2015 the Court of Appeals of Kosovo (Judgment, Ac.no.1288/13) rejected as ungrounded the appeal of the Municipality of Prizren and upheld the Judgment of the Basic Court in Prizren, of 22 November 2012.
35. The Court of Appeals, in its Judgment, found that the Municipal Court in Prizren by its Judgment made a correct assessment of the facts and correctly applied the substantive law.
36. On 9 February 2016 the Applicant based on the final Judgment C.nr. 498/12 of the Basic Court in Prizren, through a private enforcement agent, requested that the accounts of the debtor be blocked by an enforcement order until the definitive payment of the total amount of the debt.
37. On 10 February 2016 the Municipality of Prizren filed a request for revision with the Supreme Court of Kosovo. In its request for revision, the Municipality of Prizren alleged incomplete and erroneous assessment of the factual situation and essential violation of the provisions of contentious procedure and erroneous application of the substantive law by the lower instance courts.
38. In its request for revision, the Municipality of Prizren, among other things, stated that the lower instance courts made an erroneous assessment of the evidence, by not taking into consideration the evidence that the Municipality of Prizren provided to these courts. Further, the Municipality of Prizren also alleged that the provisions of the Law on Obligations (hereinafter: LO) “*should have been applied to the favor of the Municipality and not to the favor of the claimant who was guilty for not performing the contractual obligations.*”
39. On 7 June 2016 the Supreme Court of Kosovo (Judgment Rev.no.110/16) approved as grounded the revision of the Municipality of Prizren and modified the Judgment of the Court of Appeals of Kosovo and the Judgment of the Basic Court, thereby rejecting as ungrounded the Applicant’s statement of claim for the Municipality of Prizren to be obliged, “*due to the termination of the contract on concession in the name of the compensation of the damage for the investments made for using the dairy market in Prizren*”, to pay the Applicant a certain amount of money.



40. The Supreme Court in its reasoning stated that, *“In such factual situation of the matter, the Supreme Court of Kosovo cannot approve as correct and lawful the legal stance of two Courts of the lower instances regarding the approval of the statement of claim of the claimant as grounded since their Judgments are involved in erroneous application of the factual situation.”*
41. The Supreme Court, further, reasoned that, *“[...] by above mentioned minutes of inspections of the respondent, Decision of inspectorate of the marked for immediate termination of usage of the market taken on concession by the claimant, conclusion of the Board of Directors of the respondent and Decision on the termination of this agreement on concession, the claimant is exclusively guilty for the termination of this agreement, so that the respondent cannot be responsible for possible damages which were suffered by the claimant on the occasion of termination of this agreement on concession, and as a consequence, the respondent is not obliged to compensate this damage to the claimant.[...]”*
42. The Supreme Court concluded that, *“[...] on the occasion of the approval of the statement of claim of the claimant by the Courts of lower instances, the substantive law was erroneously applied, respectively Article 124 and Article 132 of the LOR, therefore, their Judgments were modified and regarding the statement of claim of the claimant it was decided entirely as in the enacting clause of this Judgment.”*

### **Applicant’s allegations**

43. The Applicant alleges that the abovementioned Judgment of the Supreme Court has violated his right, as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to fair trial) of ECHR.
44. First, the Applicant alleges that, *“The Supreme Court of Kosovo has no jurisdiction on reconsidering the evidence, relying on another consideration made by the first-instance court and the Court of Appeals. During the review of the matters, the Supreme Court does not obtain evidence; instead, it reviewed and analysis the matter as regards the control of legality and grounds of the challenged decisions.”*
45. According to the Applicant, *“Its [Supreme Court’s] control must be focused only on the aspect of the legality of the challenged decisions, namely on how the law was applied by the lower instance court. The Supreme Court cannot disregard or leave unconsidered the evidence that was reviewed and considered by the trial court, and cannot admit evidence which was not administered during the trial at the first- and second-instance courts.”*
46. Therefore, the Applicant concludes that the Supreme Court has exceeded its competences, thereby violating the Applicant’s right to a fair trial *“by a court established by the law, and when the evidence was re-reviewed, the Applicant’s right to trial by an impartial court was violated.”*

47. Secondly, the Applicant alleges that it was not notified of the revision filed by the Municipality of Prizren, in the capacity of the respondent, and as a consequence he was not afforded the possibility to respond to the allegations submitted by the respondent, namely the Municipality of Prizren, within the legal deadline of the receipt of notification of revision.
48. In this regard, the Applicant concludes that, *“the failure to provide an opportunity to declare itself on the allegations of the opposing party, expressed in the revision it had filed against the final judgment, has placed the Applicant on an unequal position in relation to the opposing party, hence the principle of equality of arms and contradictory in the civil proceedings was severely violated [...]”*.
49. Finally, the Applicant requests, among others, that the challenged Judgment be declared null and void and the case be remanded for retrial.

### **Admissibility of the Referral**

50. The Court first examines whether the Referral has met the admissibility requirements, as laid down in the Constitution and further specified in the Law and the Rules of Procedure.
51. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which provide:
  - “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 exhausting all legal remedies provided by law.”*
52. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution which provides:
 

*“Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable”*
53. Further, the Court also refers to Article 48 [Accuracy of the Referral] of the Law, which provides:
 

*“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.”*
54. The Court notes that the Applicant is an authorized party according to the Constitution, challenges an act of a public authority, namely the judgment of the Supreme Court, has exhausted the necessary legal remedies and has submitted his referral within the four (4) months period after receiving the judgment.

55. However, the Court recalls Rule 36 (1) (d) and 36 (2) (b) (d) of the Rules of Procedure, which foresees:
- (1) *The Court may consider a referral if:*  
     [...]  
     *d) the referral is prima facie justified or not manifestly ill-founded*
- (2) *The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*  
     [...]  
     *(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights.*  
     *(d) the Applicant does not sufficiently substantiate his claim.”*
56. As was stated above, the Applicant alleges that the abovementioned Judgment of the Supreme Court has violated his right, as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to fair trial) of the ECHR.
57. According to the Applicant, the Supreme Court has exceeded its competences when it made an assessment of the facts, even though in revision proceedings the Supreme Court has the right only “*to review and analyze the matter as regards the control of legality and grounds of the challenged decisions*” and not to establish the factual situation.
58. The Court notes that, in its Judgment, the Supreme Court found that the lower instance courts had erroneously applied the substantive law (specifically Article 124 and 132 of the LO). The Supreme Court referred to the factual situation established by the first instance court which assessed that the guilt for the unilateral termination of the contract lay with the Applicant. As a consequence, the Supreme Court reached the conclusion that under the respective provisions of the LO, the Municipality of Prizren, in the capacity of the respondent, was not obliged to compensate the Applicant the requested material damage.
59. Therefore, the Court considers as ungrounded the Applicant’s allegation that he is a victim of a constitutional violation caused by the Supreme Court’s exceeding of its competences.
60. Furthermore, the Court emphasizes that it is not its task to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
61. The Court recalls that it does not act as a fourth instance court with respect to decisions rendered by the regular courts. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See case *Garcia Ruiz v. Spain*, No. 30544/96, ECtHR Judgment of 21 January 1999; see also case KI70/11, Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Constitutional Court, Resolution on Inadmissibility of 16 December 2011).



62. As regards the Applicant's second allegation that it was not notified of the request for revision filed by the Municipality of Prizren, in the capacity of respondent, the Court notes that on 28 February 2017, the Basic Court in Prizren submitted to the Court a proof, namely a return receipt, showing that the Applicant's authorized legal representative received the notification of the request for revision with the Supreme Court on 8 April 2016.
63. In this case, the Court notes that the Applicant had authorized a lawyer to represent it in the proceedings before the lower instance courts. Consequently, the Court considers that the allegation of the violation of the equality of arms does not hold because the legal representative, who was authorized by the Applicant itself, was notified of and received the request for revision from the Basic Court in Prizren before the Supreme Court had made its decision on the revision.
64. In this regard, the Court considers that any procedural action or inaction by a representative is in principle attributable to the Applicant (See *Bekauri v. Georgia*, No. 14102/02 ECtHR Judgment of 10 April 2012, paragraphs 22-25; and see, *mutatis mutandis*, *Migliore and others v. Italy*, No. 58511/13 ECtHR, Decision of 27 January 2014). In this case, such actions include the receipt of court decisions as well (See cases KI46/13, KI47/13, KI48/13 and KI68/13, Applicant *Naim Morina, Bukurije Drançolli, Avdi Imeri dhe Genc Shala*, Constitutional Court Resolution on Inadmissibility of 5 July 2013).
65. Finally, the Court finds that the Applicant has not presented any convincing argument to substantiate that the alleged violations stated in the Referral constitute violation of constitutional rights (See case *Vanek v. Slovak Republic*, No. 53363/99, ECtHR Decision of 31 May 2005).
66. For the foregoing reasons, the Court concludes that the facts presented by the Applicant do not in any way justify its allegation of a violation of the right to a fair and impartial trial and that the Applicant has not sufficiently substantiated his claims.
67. Consequently, in accordance with Rule 36 (1) (d) and (2) (b) and (d) the Referral is manifestly ill-founded on constitutional basis and as such inadmissible.

## FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Articles 21.4 and 113.7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure, in the session held on 8 May 2017, unanimously

## DECIDES

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

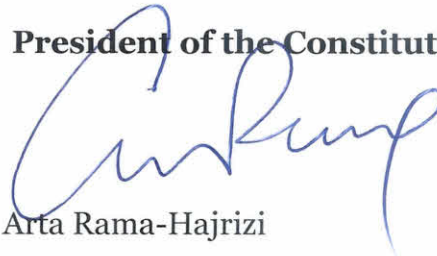
**Judge Rapporteur**



Bekim Sejdiu



**President of the Constitutional Court**



Arta Rama-Hajrizi