



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

Prishtina, 17 July 2017  
Ref. No.:RK 1103/17

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI131/16**

Applicant

**Tahir Cukaj**

**Constitutional review of  
Decision Rev. No. 184/2016 of the Supreme Court of Kosovo of  
1 September 2016**

### **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 Tahir Cukaj from village Nakell, Municipality of Peja (hereinafter, the Applicant), who is represented by Mustafë Kastrati, a lawyer from Peja.

## **Challenged decision**

2. The Applicant challenges Decision Rev. No. 184/2016 of the Supreme Court of Kosovo of 1 September 2016, which rejected as inadmissible the Revision of the Applicant filed against Decision AC. No. 321/2015 of the Court of Appeals, of 13.05.2016.

## **Subject matter**

3. The subject matter is the constitutional review of the challenged decision, which allegedly has 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).

## **Legal basis**

4. The Referral is based on Article 113 (7) of the Constitution, Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Proceedings before the Constitutional Court**

5. On 14 November 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 14 December 2016, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
7. On 18 January 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
8. On 02 June 2017, the Review Panel considered the report of the Judge Rapporteur, and recommended to the Court the inadmissibility of the Referral.

## **Summary of facts**

9. The Applicant from 2008 until 2013 served as a Director of the Department of Agriculture in the Municipality of Peja.
10. On 31 December 2013, the President of the Municipality [Decision No. 112-8192-11/2013] dismissed the Applicant from his position of Director.
11. On 10 January 2014, the Applicant filed with the Municipality an appeal against that Decision.
12. On 13 January 2014, the Municipality [Notification No. 02-112-761] rejected the appeal and upheld the Decision of the President of the Municipality.

13. On 2 March 2014, the Applicant filed with the Independent Oversight Board of Civil Service of Kosovo (hereinafter, the IOB) an appeal against the Decision dismissing him from the position of the Director.
14. On 05 March 2014, the IOB (Decision A/02/68/2014) declared itself incompetent. The IOB stated that *"the Board does not have subject matter jurisdiction to review this administrative matter, due to the fact that pursuant to Article 4 of Law No. 03/L-149 on the Civil Service of the Republic of Kosovo [...] political appointees and all the persons appointed in positions by the political appointees [...] are not civil servants"*.
15. The Applicant filed a claim with the Basic Court in Peja, requesting the confirmation of the existence of an employment relationship as a civil servant in the Municipality of Peja, reinstatement to his working place and compensation of personal income.
16. On 18 December 2014, the Basic Court [Decision C. No. 254/14] rejected the claim due to lack of jurisdiction, stating that: *"[...] the claimant's issue in the present case represents an administrative matter for which the courts of the general departments do not have subject matter jurisdiction to decide [...]"*.
17. The Applicant filed with the Court of Appeals an appeal against the decision of the Basic Court, due to erroneous and incomplete determination of factual situation, erroneous application of legal provisions and erroneous application of the procedural provisions.
18. On 13 May 2016, the Court of Appeals [Decision AC. No. 321/2015] rejected as ungrounded the Applicant's statement of claim and upheld the Decision of the Basic Court, *"[...] as the claimant in the present case does not request the annulment of the Decision by which he was discharged from the position of director, a position which he exercised until 31.12.2013 [...]"*.
19. The Applicant submitted a request for revision to the Supreme Court of Kosovo against the decision of the Court of Appeals, *"due to violations of the provisions of LCP and erroneous application of the substantive law"*.
20. On 2 September 2016, the Supreme Court [Decision Rev. No. 184/2016] rejected as inadmissible the Applicant's request for revision, because *"pursuant to the provision of Article 228.1 of LCP, it has been provided that parties may file a revision only against a final decision, by which the procedure of the second instance is concluded"*.

### **Applicant's allegations**

21. The Applicant alleges a violation of the right to fair and impartial trial, *"because the right to protection before courts and other state authorities as the holders of public competencies was denied to the Applicant"*.
22. The Applicant requests the Court *"to instruct the competent bodies to define the body which carrier body of the public competence is competent to decide on the matter of the applicant"*.



23. The Applicant further “invites” the Court “to define which is the competent authority for resolving the request of the Applicant because all other authorities until now have been declared as incompetent and there is no decision based on merit”.

### **Admissibility of the Referral**

24. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and as further provided by the Law and foreseen by 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 also refers to Article 49 of the Law which provides:

*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. Thus, the Court considers that the Applicant is an authorized party, has exhausted all available legal remedies and filed the Referral within the deadline of four (4) months.
28. However, the Court further 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”.*

29. In addition, the Court recalls Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, which stipulates that:

*“(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:*

*[...]*

*(d) the Applicant does not sufficiently substantiate his claim.”*

30. The Court recalls that the Applicant claims that the regular courts and other state authorities denied him the right to protection before the courts and thus

violated his right to fair and impartial trial. However, the Applicant does not substantiate and prove his claim.

31. In fact, the Court notes that the Applicant initiated the administrative proceedings before the IOB, requesting the annulment of Decision No. 112-8191-11/2013 of the President of the Municipality of Peja, which dismissed him from the position of Director of the Department of Agriculture.
32. The Court recalls that the IOB [Decision A/02/68/2014] declared itself incompetent, because the position of directors does not fall into the category of civil servants and IOB is competent only for considering civil servants cases.
33. The Court observes that the conclusion on incompetence was upheld by the Basic Court [Decision C. No. 254/14], by the Court of Appeals [Decision AC. No. 321/2015] and somehow by the Supreme Court [Decision Rev. No. 184/2016].
34. As matter of fact, the Supreme Court rejected the request for revision of the Applicant, because there was no merit final decision, as the dispute was about competence and having a final decision is a legal requirement for submitting the request for revision.
35. The Court observes that the Supreme Court considered that *"a revision is not allowed against the Decision of the second instance court, by which the Decision of the first instance court was upheld, in which this Court has been found to have no subject matter jurisdiction, due to the fact that we do not have a final decision in terms of Article 228.1 of LCP"*.
36. The Court recalls that the Applicant mainly requests the Court *"to define the body which (...) is competent to decide on the matter of the applicant"*. The definition of the competent body to decide on the matter of the Applicant was the very same question which crossed over all the proceedings in the regular courts and has just arrived before the Court.
37. The Court considers that the regular courts assessed the facts and interpreted and applied the procedural and substantive law provisions regarding the Applicant's claim and provided detailed response to his question.
38. In addition, the Court notes that the Applicant presents before the Court the same arguments he had submitted to the regular courts, in particular regarding the competent body to decide on the matter of his case.
39. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. See, *mutatis mutandis*, the European Court of Human Rights (hereinafter: ECtHR) case *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, para. 28.



40. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as “fourth instance court”. See: ECtHR case *Akdivar v. Turkey*, No. 21893/93, Judgment of 16 September 1996, para. 65; see also, *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012.
41. The Court also emphasizes that it is not the task of the Constitutional Court to deal with the question of jurisdiction. In fact, the role of regular courts is, in addition to the assessment of evidence and application of law, to determine the territorial and subject matter jurisdiction.
42. The Constitutional Court can only consider whether the regular court’s proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial. See, *inter alia*, case *Edwards v. United Kingdom*, No 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991.
43. In that respect, the Court considers that a detailed response to the Applicant’s question provided by the regular courts is justified and that the proceedings before the regular courts have been fair. See ECtHR case *Shub vs. Lithuania*, No. 17064/06, Judgment of 30 June 2009.
44. In fact, the Court also considers that the Applicant has not submitted any *prima facie* evidence nor has he substantiated his allegation indicating that the regular court’s proceedings were in any way unfair or arbitrary.
45. Furthermore, the Court considers that the Applicant disagrees with the challenged decision. However the Applicant’s disagreement cannot of itself raise an arguable claim for breach of his right to fair and impartial trial. When alleging such violation of the Constitution, the Applicant must present convincing evidence to prove and compelling arguments to substantiate his allegation, in order for the Referral to be grounded on a constitutional basis. See Constitutional Court case KI198/13, *Privatization Agency of Kosovo*, Resolution on Inadmissibility, of 30 June 2014.
46. Therefore, the Referral is manifestly ill-founded on a constitutional basis, and is inadmissible in accordance with Rule 36 (1) (d) and (2) (d) of the Rules of Procedure.

## FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (1) and (7) of the Constitution, Article 48 of the Law, and Rules 36 (1) (d) and (2) (b) of the Rules of Procedure, in the session held on 02 June 2017, 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. TO DECLARE this Decision effective immediately.

**Judge Rapporteur**



Almiro Rodrigues



**President of the Constitutional Court**



Arta Rama-Hajrizi