



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Pristina, 26 February 2013
Ref.No.:AGJ361/13

JUDGMENT

in

Case No. KI 41/12

Applicants

Gëzim and Makfire Kastrati

against

Municipal Court in Prishtina and Kosovo Judicial Council

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicants

1. The Applicants are the parents of the deceased D. K., Mr. Gëzim Kastrati and Mrs. Makfire Kastrati with residence in Prishtina, represented by the Law Firm “Sejdiu & Qerkini” l.l.c. based in Prishtina.

Subject matter

2. The Applicants allege that the Municipal Court in Prishtina did not act according to the Law No. 03/L-182 on Protection against Domestic Violence. Consequently, the violation is not a consequence of a court decision, but of inaction of the Municipal Court in Prishtina.

Legal basis

3. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 21 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 56 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, Rules of Procedure).

Proceedings before the Court

4. On 17 September 2012, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the “Court”), alleging that the Municipal Court in Prishtina by its inaction violated Articles 25, 31, 32 and 54 of the Constitution of the Republic of Kosovo.
5. On 23 April 2012, the President appointed Judge Iliriana Islami as Judge Rapporteur and the review Panel composed of Judges: Almiro Rodrigues (Presiding), Kadri Kryeziu and Enver Hasani.
6. On 4 May 2012, the Constitutional Court requested to the Applicant additional information and documents.
7. On 7 May 2012, the Constitutional Court informed the Municipal Court in Prishtina and the Kosovo Judicial Council (hereinafter, KJC) about the submitted Referral and invited them to submit their comments regarding the filed allegations.
8. On 8 May 2012, the Applicant submitted to the Constitutional Court a submission for expansion of the initial Referral, requesting the review of allegation for violation of right to life, provided by Article 25 of the Constitution, Article 3 of Universal Declaration of Human Rights and Article 2 of the European Convention of Human Rights (hereinafter, ECHR).
9. On 11 May 2012, the Applicant submitted additional information and documents, requested by the Constitutional Court on 4 May 2012.
10. On 31 May 2012, the Constitutional Court informed the Municipal Court in Prishtina and KJC on the expansion of the initial Referral by the Applicant, and

requesting from the Municipal Court in Prishtina to offer comments regarding the allegations filed by the Applicant.

11. On the same date, the Constitutional Court requested from the Municipal Court in Prishtina, to submit complete documentation of the case of the deceased and to the KJC to provide taken information regarding the case of the deceased. So far, no response was received from the Municipal Court in Prishtina.
12. On 7 June 2012, the Court received a response from KJC, informing about the steps taken by KJC regarding the above-mentioned case.
13. On 2 July 2012, the President replaced Judge Iliriana Islami as Judge Rapporteur, due to her mandate expiring, with Judge Altay Suroy.
14. On 25 January 2013, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

Summary of facts

15. The Applicants are the parents of D. K., born on 18 February 1984 in Prishtina, who was deprived of life on 18 May 2011. D. K. lived with her family until 10 February 2000.
16. During secondary school, D. K. met A.J., with whom she established a personal relationship and on 2 February 2000 they decided to establish an extra marital union.
17. On 2 August 2003, a girl was born to D.K. and A.J.
18. On 17 January 2011, D. K. filed a Claim for Dissolution of the Extramarital Union with A.J., because of deterioration of their relationship.
19. After filing the claim, D. K. took their daughter and they went to live to her parents.
20. On 26 April 2011, D. K. submitted a request to Municipality Court in Prishtina, specifying changes to the original claim of 17 January 2011, requesting that the subject of review to be only the matter of custody of their daughter to care, food and education.
21. On 26 April 2011, as a consequence of continuous threats made by A.J. against D.K. and their daughter, D.K. submitted a request to the Municipal Court in Prishtina for issuance of an emergency protection order against Domestic Violence, based on Article 15 of the Law No. 03/L-182.
22. On 18 May 2011, D. K. passed away after receiving wounds to her neck from the gunshot fired by A.J. Their daughter A. was sent to the parents of A. J. in their residence "AS" Hotel.

23. On 30 May 2011, the parents of D. K. (the Applicants) submitted a request for Specification of Claim, submitted to the Municipal Court in Prishtina by D. K. on 17 January 2011, where they requested that the respondent is S. J. (the father of A. J.).
24. On 29 July 2011, the non-governmental organization CLARD (Centre for Legal Aid and Regional Development), according to the power of attorney submitted (letter 01/031-1031) to KJC a “request for efficacy in implementation of the Law against Domestic Violence”, focusing on the case of D.K.
25. On 29 September 2011, the non-governmental organization CLARD submitted a letter before the KJC (01/031-1031), insisting to receive information or response from KJC on the beforehand submitted request.
26. On 07 November 2011, the non-governmental organization CLARD received a response to the letter 01/031-1031 from KJC, stating that the request will be treated in one of the coming meetings of the Council. It is also suggested, for certain cases where CLARD considers that the appointed judges failed to implement the law, to initiate investigations in the Office of the Disciplinary Counsel (Law on Kosovo Judicial Council, Chapter VII, Article 43, 44 and 45).

Applicant’s allegations

27. The Applicants allege that the Municipal Court of Prishtina, by its inaction in compliance with its constitutional and legal obligation to deal with the request for the emergency protection order, has violated the individual rights of D.K. and indirectly, of the Applicants, guaranteed by Articles 25, 31, 32 and 54 of the Constitution of the Republic of Kosovo and Articles 2, 6 and 13 of the European Convention for human Rights (hereinafter, ECHR).
28. Moreover, the Applicants allege that the Constitutional Court addresses this issue with an aim of prevention of similar tragic cases in the future as well as to increase public awareness about the urgency of functionality of the regular courts.
29. The Applicants further state that “The Municipal Court of Prishtina, had an obligation to act within twenty four (24) hours from the moment, D.K. submitted the request for an emergency protection order. That court did not act at all in this case. The review of the respective legislation shows that concerning legal remedies in cases of inaction of the Municipal Court of Prishtina, when it should act, as obliged by Article 19 of the Law No. 03/L-182 on Protection against Domestic Violence, it can be concluded that there are no legal remedies which may be used by the victim in the case of inaction by the Municipal Court.”
30. The Applicants further state that “Article 19 of the Law No. 03/L-182 on Protection against Domestic Violence provides only appeal procedures against the court decisions for a protection order, but it does not provide legal remedies to the applicants for the requests for protection in cases when the court does not act at all.”

31. Furthermore, according to the Applicants, "In the same way, the Law No. 03/L-006 on Contentious Procedure provides a series of legal remedies-including the appeal, revision, repetition of procedure and protection of legality but all these legal remedies do not address the case when the alleged constitutional violations are a consequence of the inaction of the public authority (non-existence of the court decision). At the same time, the Law No. 03/L-223 on Kosovo Judicial Council, in the Articles 33-49, provides only the initiation of disciplinary procedure and the sanctions against the judges or the lay judges for inappropriate behavior. But, this law does not provide legal remedies for the current circumstances, when the Court does not act in the protection of the rights guaranteed by the Constitution and international conventions".
32. The Applicants insist that "in this case, not only that the exhaustion of legal remedies is not effective, in fact it is impossible, since legal remedies do not exist at all."
33. The Applicants further state that, through the NGO CLARD, they addressed KJC, requesting the implementation of the Law on Protection against Domestic Violence, with a purpose to prevent the negligence of regular courts, which results in the violation of individual rights of other victims. But, according to the Applicant, this addressing was not fruitful too, since initially, the KJC has not answered to the letters sent through CLARD, and later made a response that the issue will be addressed in the next meeting of the Judicial Council, but in fact, the Applicants have not received any response until 26 March 2012.
34. The Applicants state that, on 26 March 2012, through the NGO CLARD, they have received a letter from KJC, by which they were informed that the KJC sent to the Municipal Courts its decision, which instructs those courts to implement the Law No. 03/L-182 on Protection against Domestic Violence. By this, according to the Applicants, "The KJC, not only, does not address the issue of D. K. and the violation of her rights, but it does not even offer legal remedies for the future cases of domestic violence when the victims request actions from municipal courts, but they do not act at all."
35. Furthermore, the Applicants allege that "the lack of legal remedies, theoretical and practical, in this case can be qualified as a violation of individual rights. Article 13 of the ECHR and Article 32 of the Constitution guarantee the right to legal remedies. The Law No. 03/L-182 on Protection against Domestic Violence does not provide legal remedies at all to the Applicants for the requests for a protection order from violence in the event the court does not act at all. Therefore, the impossibility of access to legal remedies in the abovementioned case in itself implies a violation of rights guaranteed by the Constitution and conventions."
36. In the elaboration of their allegation for violation of Article 25 of the Constitution and Article 2 of ECHR, the Applicants refer to the case law of the European Court for Human Rights (hereinafter, the ECtHR) stating that "This Court, in the case *Osman v. The United Kingdom* has assessed that the person, who alleged that his right to life has been violated should prove that (1) the authority knew or ought to have known about the real and immediate risk to life of identified individual or individuals from the criminal offences of a third party

and (2) failed to take measures within the scope of its competence, which judged reasonably, might have been expected to avoid this risk. Therefore, the state has an obligation to act when the abovementioned requirements are proved by the individual, in contrary it is qualified that it violated the person's right to life.

37. Moreover, the Applicants claim that "ECtHR goes a step further and rules that an individual, in order to keep the state responsible for violation of the right to life, should only prove that the authority did not do all that could reasonably be expected of them to avoid a real and immediate risk to life for which they knew or ought to have known."
38. The Applicants further state that "There are a series of cases where the ECtHR has adjudicated that the public authority has violated the right to life in circumstances when it failed to act in protecting the person, therefore in circumstances very close to those of D. K. In the case *Kontrova v. Slovakia*, the police convinced a woman to withdraw the criminal report against her spouse, when he beat her up with an electrical cable. After the withdrawal of the criminal report, the spouse killed his son, his daughter and his wife, was not granted compensation. The ECtHR ruled and found violation of the right to life, specifically of Article 2 of the European Convention, because the police failed to protect the children's life. At the same time, the court found also a violation of Article 13 (the right to effective remedies), due to non-compensation of the mother. Similar positions on violation of the right to life (Article 2), the ECtHR are shown also in other cases such as *Branko Tomašić and Others v Croatia* and *Opuz v Turkey*."

Response of Kosovo Judicial Council

39. In the response received from KJC, dated 7 June 2012 *inter alia* it is stated:

"The Disciplinary Committee of the Kosovo Judicial Council received on 21 July 2011 the proposal ZPD/11/kb/0556 for initiation of the procedure for suspension of the judge E.Sh., the judge on the Municipal Court in Prishtina for misconduct: Failure to perform judicial functions from Article 34, par. 1, item 1.2 of the Law on Kosovo Judicial Council; b) Violation of Applicable Code of Ethics, Article 34, par. 1, item 1.4 of the Law and that is: I. General principles item 1 (the judge acts at any time in a way that he promotes confidence of public with dignity, integrity and independence of judicial power; b) Respects and complies with the law; c) performs duties in a careful manner; e) performs duties in compliance with international standards on human rights; and II Specific Rules A. Adjudicatory Activities, I. During the procedure, it is the duty of a judge to protect the rights and freedoms of all persons. The Disciplinary Committee of KJC held a session to review the request for suspension on 31.08.2011 and has rejected the request for paid suspension as ungrounded and as such is rejected due to the reason that a long time has passed from the time the proposal was delivered from the day the tragic event took place, respectively the proposal was submitted on 21 July 2011, so approximately 2 months have passed and the imposition of this measure would not have any effect.

Pursuant to Article 36, par. 1 of the Law on Kosovo Judicial Council, the Disciplinary Committee made a decision that against E Sh., the judge in the Municipal Court in Prishtina is initiated a procedure and disciplinary investigation and this session should be held within the time limit when the Office of the Disciplinary Counsel sends the final report.

Against this decision was filed an appeal by ODC and the Kosovo Judicial Council held a meeting and reviewed this appeal on 31 October 2011, dismissed the appeal of the Office of Disciplinary Counsel as non-substantive, after the committee held a session and made a decision on this case. The Disciplinary Committee in the session held on 18.10.2011 with the decision no. KD. no. 40/2011, imposed the disciplinary measure of Reduction of salary for 50% for two months from the monthly salary. With this decision with number KD. no. 40/2011 the procedure was concluded, and the dissatisfied party has the right of appeal, which the Council will review, but no party filed an appeal against this decision."

Applicable law

40. Relevant legal provisions regarding the alleged violations of the Applicant are defined in the following instruments:

Law No. 03/L-182 on Protection from Domestic Violence

Article 1 [Purpose of the Law]

1. *This Law aims to prevent domestic violence, in all its forms, through appropriate legal measures, of the family members, that are victims of the domestic violence, by paying special attention to the children, elders and disabled persons.*
2. *This Law, also aims, treatment for perpetrators of domestic violence and mitigation of consequences.*
[...]

Article 13 [Petitions for Protection Orders or Emergency Protection Orders]

1. *A petition for protection order may be submitted by:*
 - 1.1. *the protected party;*
 - 1.2. *an authorized representative of the protected party;*
 - 1.3. *a victim advocate, upon consent of the protected party;*
 - 1.4. *representative social welfare centre in the municipality where the protected party permanently or temporary resides in cases where the victim is minor.*
2. *A petition for emergency protection orders may be submitted by:*
 - 2.1. *the protected party;*

- 2.2. *an authorized representative of the protected party;*
 - 2.3. *the victim advocate, upon consent of the protected party;*
 - 2.4. *a person with whom the protected party has a domestic relationship;*
 - 2.5. *a representative from the Center for Social Work in the municipality where the protected party permanently or temporarily resides in cases where the victim is minor;*
 - 2.6. *a person with direct knowledge of an act or acts of domestic violence against the protected party.*
3. *A petition for protection order or emergency protection order may be submitted by NGOs that are familiar with problem of the victim and are well informed for their treatment.*
- [...]

Article 16 [Review of Petition for Emergency Protection Order]

- 1. *The court shall decide on a petition for an emergency protection order within twenty-four (24) hours after the submission of the petition.*
- 2. *In reviewing a petition for an emergency protection order, the court shall hold a hearing so that the following persons may be heard:*
 - 2.1. *the protected party, the authorized representative, or the victims advocate;*
 - 2.2. *the perpetrator or an authorized representative;*
 - 2.3. *the petitioner; and*
 - 2.4. *any witness, who knows about the domestic violence.*
- 3. *The court may hold a hearing and issuance of the protection order in the absence of the perpetrator, where appropriate, by applying also other alternative measures including electronic ones.*

Law No. 03/L-223 on the Kosovo Judicial Council

Article 34 [Misconduct]

- 1. *For purposes of this law, misconduct of a judge or lay judge shall consist of the following:*
 - 1.1. *upon conviction for a criminal offense, with the exception of a minor offense as defined by law.*
 - 1.2. *negligence in performing, a failure to perform, or abuse of judicial functions.*
 - 1.3. *failure to perform judicial functions independently and impartially. 22*
 - 1.4. *violation of the applicable code of ethics.*
- 2. *Disciplinary Committee may suspend judge or lay-judge with pay during any period of investigation or during the disciplinary proceedings.*
- 3. *The Judicial Council shall issue rules that define the misconducts.*

[...]

Article 37 [Disciplinary Measures]

1. The Disciplinary Committee may impose the following disciplinary measures:

- 1.1. reprimand;*
- 1.2. reprimand with a directive to take corrective actions;*
- 1.3. temporary reduction of salary by up to fifty percent (50%) taking into account the nature of misconduct; or*
- 1.4. propose the removal of a judge or lay judge from office.*

2. The Disciplinary Committee shall impose a disciplinary measure that is consistent with the circumstances, level of responsibility, and consequences of the misconduct.

3. The Committee shall submit a written recommendation for the dismissal of a judge or lay judge from office to the Council, as provided in this law.

4. If the judge or lay judge is released from the charges at the completion of the disciplinary procedure, he or she shall return to his or her previous office upon the decision of the Council.

Article 38 [Dismissal of Judges and Lay Judges]

1. The Council shall determine, based on disciplinary proceedings, whether the misconduct of a judge or lay judge justifies the dismissal. Every recommendation from the Council for the dismissal of a judge or lay judge shall include the written reasons for such recommendation and the basic conclusions of the Committee.

2. The recommendation of the Council for dismissal, as foreseen in paragraph (1) of this article, shall, within fifteen (15) days, be submitted to the President and the judge or lay judge concerned.

3. The President, in accordance with the Constitution and this law, shall decide on the recommendation of the Council for dismissal.

4. Judges and lay judges shall formally be notified by the Council regarding the decision of the President for the approval or disapproval of dismissal from office before such a decision is enforced.

[...]

Article 45 Responsibilities of the Office of Disciplinary Counsel

1. The Office of Disciplinary Counsel is responsible for investigating judges or lay judges when there is a reasonable basis to believe that misconduct may have occurred, and for making recommendations and presenting the evidence supporting disciplinary action to the Disciplinary Committee.

2. The Office of Disciplinary Counsel shall initiate investigations in cases when:

- 2.1. there is a complaint filed at the Office of Disciplinary Counsel by any natural or legal person;*

2.2. on its own initiative, when there is a reasonable basis to believe that a judge or lay judge may have engaged in misconduct.

- 3. All complaints, regardless of their origin, shall be submitted to the Office of Disciplinary Counsel for investigation.*
- 4. The Office of Disciplinary Counsel shall investigate thoroughly all matters referred to it, shall determine whether recommendations of disciplinary action should be presented to the Disciplinary Committee, and shall notify in writing the Disciplinary Committee and the suspected judge or lay judge regarding the results of the investigation.*
- 5. The Office of Disciplinary Counsel shall have the right to summon witnesses and documents as necessary to investigate and determine whether recommendations of disciplinary action should be presented to the Disciplinary Committee.*
- 6. The Office of Disciplinary Counsel shall present recommendations of disciplinary action and the evidence supporting disciplinary action for misconduct to the Disciplinary Committee.*

Assessment of the admissibility of the Referral

41. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.
42. In this respect, the Court refers to Article 113.7 of the Constitution, which establishes:

"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."

The Court refers to Article 47 of the Law, which provides that:

"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."

and that

"The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

43. The Court first reviews whether the Applicants meet all requirements to be an authorized party, in compliance with respective constitutional and legal provisions.
44. For this purpose, the Court refers to the case law of ECtHR, which in similar cases has received individual requests from the individuals that are considered as indirect victims, where there is a personal and specific connection between the victim and the Applicant. In this regard, the ECtHR has recognized as an authorized party the spouse of the deceased (see McCann and Others against

United Kingdom, no. 18984/91, Judgment dated 27 September 1995), while in another case the nephew of deceased was recognized the status of an authorized party (see *Yaşa against Turkey*, no. 63/1997/847/1054, Judgment dated 2 September 1998).

45. Consequently, taking into account that the Applicants are the parents of the deceased, the Court concludes that the Applicants may be considered as authorized party pursuant to Article 113.7 of the Constitution and Article 47 of the Law.
46. In addition, the Court should conclude whether the Applicants have exhausted all existing legal remedies within the justice system in the Republic of Kosovo.
47. The Constitutional Court, in the Judgment AGJ63/10 in the case KI 06/10 Valon Bislimi against Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice, stated that, according to the settled case-law of the European Court of Human Rights, the Applicants should exhaust available effective domestic legal remedies. Furthermore, this rule should be applied with flexibility and without exaggerated formalism. The ECtHR further stated that the rule for the exhaustion of legal remedies is neither absolute, nor is able to be applied in an automatic manner; in event of review if it was applied, it is important to take into account the specific requests of each individual case. This means amongst others, that he should consider not only the existence of official legal remedies in the system of the country in question, but also the general legal and political context where they act (see the Judgment of ECtHR, in the case *Akdivar v. Turkey*).
48. The Constitutional Court notes that, on 26 April 2010, the deceased D. K. has submitted to the Municipal Court in Prishtina a request for issuance of an emergency protection order.
49. The deceased D. K. did not have any other legal remedy, since she has not received any decision from the Municipal Court in Prishtina, accepting or rejecting the request.
50. On the other hand, the Applicants insist that they did not have available and effective remedies they may have used either.
51. In this respect, the Court notes that according to the legislation in force and the written response by KJC, where the disciplinary procedure conducted is described regarding this case, all what the Applicants could do is to complain to the Office of Disciplinary Counsel, while in further stages in the KJC respective committee they could not be a party in the procedure.
52. Therefore, the Court considers that the Applicants did not have any effective legal remedy at their disposal to safeguard their rights.
53. The Court concludes that the Applicant has met the admissibility requirements, since the Applicants are an authorized party, they did not have an available legal remedy that would be effective and clearly specified the alleged violations of human rights and freedoms.

Assessment of constitutionality of Referral

I. Regarding the right to life

54. The Applicants complain that, as a result of the inaction of the Municipal Court in Prishtina, the right to life as provided by Article 25.1 of the Constitution was violated.

55. Article 25.1 of the Constitution establishes that:

“Every individual enjoys the right to life”.

56. On the other side, Article 2 of ECHR states:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

57. The Court emphasizes that the right to life is the most important right of human beings. It is the right from where all other rights derive.

58. The Court recalls that, in accordance with Article 53 of the Constitution, it is its constitutional obligation to conduct an interpretation of human rights and fundamental freedoms in accordance with the case-law of ECtHR.

59. In this regard, the ECtHR stresses that it is the duty of state authorities not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman v. the United Kingdom*, judgment of 28 October 1998, cited also in the *Kontrova versus Slovakia*, 24 September 2007 and *Opus v. Turkey*, 9 June 2009).

60. In addition, to extend to a positive obligation, it should be confirmed that the authorities, who knew or ought to have known at the time of existence of a real and immediate risk to the life of an identified individual from the criminal offence by a third party, failed to take measures within the scope of its competence, which judged reasonably, might have been expected to avoid this risk (*ibid.*, paragraph 116).

61. In this context, the Court notes that from the documentation submitted to the Court, it can be concluded that the responsible authority, in this case the Municipal Court in Prishtina, ought to have known about the real risk that had

existed when the request for issuance of an emergency protection order was submitted, since D.K. had explained in a chronological order the deterioration of relations between them, by specifying also the death threats by her former partner and by offering evidence for previous reports to the police authorities about these received threats.

62. Furthermore, the Municipal Court in Prishtina, previously treated a case initiated by D.K. for dissolution of extra marital union and for the issue of entrustment of the child's custody and with her ex-partner, when the serious problems started to appear between them and which later resulted in different threats.
63. In such circumstances, the Constitutional Court concludes that the Municipal Court in Prishtina was responsible for taking actions foreseen by the Law on Protection against Domestic Violence and that its inaction presents violations of constitutional obligations that derive from Article 25 of the Constitution and Article 2 of ECHR.

II. Regarding the Right to Effective Legal Remedies

64. The Applicants also complain that the right to an effective legal remedy, guaranteed by Articles 32 and 54 of the Constitution is violated.
65. Article 32 [Right to Legal Remedies] establishes that:

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.

66. Also Article 54 [Judicial Protection of Rights] establishes that:

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

67. In addition, Article 13 of ECHR-states that:

"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."

68. The Court, in the Judgment of 30 October 2010 in the case KI 06/10, Valon Bislimi against the Ministry of Internal Affairs, Kosovo Judicial Council and the Ministry of Justice, has dealt with the issue of Effective Legal Remedies, where it stated:

"...The Court recalls that according to the case-law of the European Court of Human Rights, Article 13 of the Convention guarantees the availability at (national level of) a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect

of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable claim" under the Convention and to grant appropriate relief. (see Judgment 63 10, dated 30 October 2010, § 91)"

69. Furthermore, in the same Judgment, the Court stated that: *"The scope of obligation under Article 13 of the Convention varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, European Court on Human Rights judgment in the case Silver and Others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, p. 42, para 113) (ibid. § 92)."*
70. It also must be recalled that in the same Judgment it is explained that *"The rule on exhaustion of remedies is based on the assumption reflected in Article 13 (with which it has a close affinity) that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see the European Court on Human Rights judgment in the case Kudla v. Poland, 26 October 2000).*
71. In this case, the Court observes that the legislation in force: the Law on Protection against Domestic Violence and the Law on Kosovo Judicial Council do not offer effective legal remedies for the protection of rights of the Applicants.
72. In fact, on one side, the Law for Protection against Domestic Violence does not foresee measures for addressing the inaction of respective institutions in those cases when they are obliged to act. On the other hand, as it may be seen from the Law on Kosovo Judicial Council and also from the response of KJC, the Applicants do not have any other possibility, apart from the appeal in the Office of the Disciplinary Prosecutor, but not further in other stages of the procedure. According to Article 45.5 of this Law, it is the right, but not the obligation of the Office of Disciplinary Prosecutor *"to summon witnesses and documents as necessary to investigate and determine whether recommendations of disciplinary action should be presented to the Disciplinary Committee."*
73. The Court recalls that the main responsible institution, the Municipal Court in Prishtina, failed to provide responses to the questions raised by the Court and did not submit documentation which it possesses regarding this case.
74. Therefore, the Court concludes that the inaction of the Municipal Court in Prishtina regarding the request of the deceased D.K. for issuing an emergency protection order, as well as the practice developed by KJC in not addressing the inaction of regular courts, when they should, has obstructed the victim and the Applicants in exercising their rights to effective legal remedies, as foreseen by Articles 32 and 54 of the Constitution and Article 13 of ECHR.

III. Regarding Article 31 of the Constitution and Article 6 of ECHR

75. The Court does not consider it is necessary to deal with the allegations of a violation of Article 31 of the Constitution and Article 6 of the Convention, given that the Court has found violations of the Articles 25, 32 and 54 of the Constitution and Articles 2 and 13 of ECHR and there was no hearing or a court session about the abovementioned case.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rule 56 (1) of the Rules of Procedure, on 25 January 2012, unanimously

DECIDES

- I. To declare the Referral admissible;
- II. To hold that there has been violation of the right to life, as provided by Article 25 of the Constitution and Article 2 of ECHR;
- III. To hold that there has been violations of the right to legal remedies as provided by Articles 32 and 54 of the Constitution and Article 13 of ECHR;
- IV. To consider unnecessary to deal with allegation of a violation of the right to fair and impartial trial, provided by Article 31 of the Constitution and Article 6 of the ECHR;
- V. To notify this Decision to the Parties;
- VI. To publish this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;
- VII. This Decision is effective immediately.

Judge Rapporteur

Altay Suroy



President of the Constitutional Court

Prof. Dr. Enver Hasani