



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

Prishtina, on 28 March 2017  
Ref. no.: VMP 1051/17

## DECISION ON INTERIM MEASURE

in

**Case no. KI31/17**

Applicant

**Shefqet Berisha**

**Constitutional review of Decision CLM No. 10/2016 of the Supreme Court  
of Kosovo, of 24 August 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 Shefqet Berisha (hereinafter: the Applicant) from Prishtina.

## **Challenged decision**

2. The Applicant challenges Decision CML No. 10/2016, of the Supreme Court, of 24 August 2016.
3. The above-mentioned decision is challenged in connection with Decision PPP.No.1216/15, of the Basic Court in Prishtina, of 21 November 2016; Decision Ac. no. 1347, of the Court of Appeal, of 24 April 2016; Judgment Rev. No. 50/2016, of the Supreme Court, of 4 April 2016; Decision C. No. 2929/2015, of the Basic Court in Prishtina, of 15 February 2016; Judgment Ac. No. 401/204, of the Court of Appeal, of 26 October 2015 and Judgment C. No. 162/09, of the Basic Court in Prishtina, of 29 October 2013.

## **Subject matter**

4. The Applicant requests constitutional review of the above-mentioned decisions which have allegedly violated his rights, as guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 22.2 [Direct Applicability of International Agreements and Instruments] and Article 54 [Judicial Protection of Rights] 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: the Convention).
5. In addition, the Applicant requests the Court to impose an interim measure against Judgment C. No. 162/09, of the Basic Court in Prishtina, of 29 October 2013, and estop any judicial proceedings, enforcement proceedings, actions or decisions of public authorities which derive from that judgment until the final decision of the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. The object of the above-stated judgment and the ensuing enforcement proceedings is the seizure of the Applicant's private property and his invalidity pension which is necessary for his medical treatment.

## **Legal basis**

7. The Referral is based on Articles 113.7 and 116.2 of the Constitution, Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rules 54 and 55 of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

## **Proceedings before the Court**

8. On 10 March 2017, the Applicant submitted the Referral to the Court.
9. On 22 March 2017, the President of the Court, by Decision GJR. KI31/17, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, by Decision KSH. KI31/17, the President of the Court, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodrigues (member) and Ivan Čukalović (member).

10. On 22 March 2017, the Court notified the Applicant about the registration of the Referral. On the same date the Court notified the Supreme Court of the registration of the Referral.
11. On 27 March 2017, the Judge Rapporteur recommended to the Court to grant an interim measure. On the same date, the Court decided by majority to grant an interim measure until 20 June 2017.

### **Brief summary of facts**

12. On 2 February 2009, the claimant K.Sh. filed a claim with the then Municipal Court in Prishtina requesting the Applicant to be obliged to pay to him the amount of € 20,337.40 including the interest from the day the claim was submitted.
13. On 23 June 2010, K.Sh. submitted another claim with the Basic Court, requesting the Applicant to be obliged to pay him € 17,500 interest included.
14. On 1 January 2013 the Law No. 03/L-199 on Courts entered into force. Pursuant to Article 2 paragraph 1 sub-paragraph 1.2. of that Law: *“Basic Court- the court of first instance comprised of seven geographic areas as established by this Law”*.
15. On 6 February 2013, the Basic Court rendered a decision which obliged the Applicant to reply to the claim of K.Sh. within fifteen (15) days.
16. On 15 February 2013, the Applicant in his reply objected the allegations of K.Sh. and requested from the Basic Court to reject the statement of claim of K.Sh. in its entirety as ungrounded or to dismiss it as inadmissible.
17. On 19 April 2013 and 7 June 2013, two judicial sessions were held whereby witnesses were heard. The Applicant objected the way the evidence was taken and assessed, because, on one hand, the evidence and the witnesses proposed by the Applicant were rejected, while on the other hand, the evidence and the witnesses proposed by K.Sh. were admitted by the court.
18. On 29 October 2013, the Basic Court in Prishtina by Judgment C. no. 162/09 approved the statement of claim of the claimant K.Sh. and obliged the Applicant to pay the claimant the ‘outstanding loan’. On the same date, the Applicant submitted new evidence alleging that: (i) the legitimacy and identity of K.Sh. was not accurately determined and that his identity was not known; and, (ii) proposed a witness to be heard. Allegedly the evidence and the proposed witness were rejected by the court.
19. The Applicant filed an appeal with the Court of Appeal on the grounds of essential violation of the procedural provisions, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law, with a proposal that the appealed judgment was annulled and the case be remanded for fresh consideration.

20. On 26 October 2015, the Court of Appeal by Judgment CA. no. 401/2014 rejected the appeal of the Applicant as ungrounded and upheld the Judgment of the Basic Court.
21. On 23 November 2015, the Applicant filed a request for revision with the Supreme Court on the grounds of essential violation of the procedural provisions, erroneous application of the substantive law and erroneous and incomplete determination of factual situation. The Applicant again reiterated that he raised through the lower instances the argument for alleged violations of his right to fair and impartial trial for not accepting to hear his witness and take into account his evidence.
22. On 30 November 2015, upon request of the claimant K.Sh., the Office of the Private Enforcement Agent issued an order (P. no. 784/15) of enforcement. The applicant objected to that order (see paragraphs 33-36 below).
23. On 4 April 2016, the Supreme Court by Judgment Rev. No. 50/2016 rejected as ungrounded the request for revision of the Applicant, upheld his obligation to the claimant and modified the decisions of lower instance court only in terms of the interest rate. The Supreme Court reasoned that: (i) the decisions of the regular courts were sufficiently clear and well reasoned; (ii) the existence of a legal relationship between the litigants was confirmed by the testimony of witnesses; (iii) the witness proposed by the Applicant to be heard was irrelevant in the case at issue; and, (iv) the allegation questioning the identity and legitimacy of K.Sh. was ungrounded and that the Applicant did not raise that allegation before the courts of lower instance, *inter alia*, contrary to the facts and the minutes present in the courts files.
24. In the interim, the claimant K.Sh. filed a proposal for imposition of security measures against the immovable property of the Applicant.
25. On 15 February 2016, the Basic Court in Prishtina, by Decision C. no. 2929/2015 approved as grounded the proposal of the claimant K.Sh. to impose the security measures. The Applicant was ordered not to construct anything, not to sell, and not to contract and certify the contract on the sale-purchase of the Applicant with the competent notary in Prishtina in the cadastral unit assigned in Prishtina until another decision of this court was rendered.
26. The Applicant filed an appeal against this Decision of the Basic Court with the Court of Appeal in due time.
27. On 24 April 2016, the Court of Appeal, by Decision Ac. no. 1347/16 rejected as ungrounded the Applicant's appeal and upheld the Decision of the Basic Court.
28. The Applicant submitted a request for protection of legality to the Office of the Chief State Prosecutor, claiming, *inter alia*, that the claimant K.Sh., during all the time was presented with a false identity and that this was not verified by the courts, despite numerous complaints of the Applicant.
29. On the question of identity and legitimacy of K.Sh., the Applicant attached as evidence a notification by the German prosecution authorities which in its

relevant part read: “...the Kosovar authorities have been notified via Interpol...that the accused Sch. (formerly known as K.Sh., in 1995, by naturalization became a German national and changed his name to A. C. R. Sch.)...up to what degree does the use of previous personal data constitute a criminal offence...it is a responsibility of Kosovar authorities”.

30. On 31 May 2016, the Office of the Chief State Prosecutor notified the Applicant that it received his initiative and had submitted a request for protection of legality with the Supreme Court. The State Prosecutor stated before the Supreme Court that the decisions of the courts had to be invalidated due to essential violations of the procedural law.
31. On 4 August 2016, the Applicant filed a Referral with the Court. The Court declared the Referral inadmissible on the grounds that it was premature as the proceedings were pending before the Supreme Court. The Court also noted that the Referral raised important constitutional questions as to the procedural legitimacy of the parties and hearing of witnesses (see Constitutional Court of the Republic of Kosovo: Case No. KI102/16, *Applicant Shefqet Berisha*, Resolution on Inadmissibility, of 7 March 2017, paragraph 41)
32. On 24 August 2016, the Supreme Court by Decision CLM. No. 10/2016 rejected as ungrounded the request for protection of legality of the State Prosecutor filed against the decisions of the trial and the appeal courts in the proceedings. The Supreme Court reasoned that the request for protection of legality could be filed only for violations pertaining to territorial competence, the obligation to hold public hearing or in situation when the public was kept out of a public hearing. The Supreme Court concluded that the request for protection of legality could not be filed for violations of the procedural legitimacy of the parties.
33. On 21 November 2016, the Basic Court in Prishtina by Decision PPP.no.1216/15 rejected the objection of the Applicant against the order for enforcement (P. no. 784/15 of 30 November 2015) issued by the Office of Private Enforcement Agent. The Basic Court held that the enforcement order was based on Judgment C. no. 162/09 of the Basic Court in Prishtina of 29 October 2013.
34. The object of the above-stated enforcement proceedings was the seizure of the Applicant's private property and the blockage of his invalidity pension which was necessary for his medical treatment.
35. The Applicant challenged the above-stated decision (PPP.no.1216/15) of the Basic Court before the Court of Appeal.
36. The Court notes that although challenged the enforcement proceedings are ongoing before the Court of Appeal, but they cannot prevent the execution of the decision of the Basic Court for seizure of the property of the Applicant.

## Applicant's allegations

37. The Applicant alleges a violation of Articles 31 [Right to Fair and Impartial Trial], 22.2 [Direct Applicability of International Agreements and Instruments] and 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 6 (Right to a fair hearing) of the Convention.
38. The Applicant alleges that the regular courts at all instances did not take into account the evidence proposed by him, nor had they justified why they rejected such evidence. This included, *inter alia*, rejection to determine precisely the identity of K.Sh. and to hear the witness proposed by the Applicant. This witness, according to the Applicant, – was an important witness for the fair determination of his case, i.e. whether he owned the claimant money or not, whether the claimant really gave him “loan” or not.
39. The Applicant alleges that in his case, due to the rejection to submit his evidence and his witness to be heard and the lack of reasoning for that, the principle of equality of arms and the right to a reasoned decision were violated, as a core component of the right to fair and impartial trial. Furthermore, the Applicant stated that he never admitted that he took or owed any money to the claimant contrary to what the basic court stated.
40. The Applicant alleges that: *“The Supreme Court of Kosovo violated Article 6 of the Convention, because it did not deal at all with the request for participation in the session of revision submitted on the grounds of violation of human rights and freedoms -Article 6 of Convention. Through this request I requested the court to hold the hearing in which it would hear my allegations for violation of fundamental human rights and freedoms -Article 6 of Convention. The arguments for violation of fundamental human rights and freedoms by the previous courts (violations that have prevented fair and impartial trial) are attached to this letter and are justified by reference to the case law of the ECtHR.”*
41. The Applicant states that: *“The State Prosecution requested the annulment of the court decisions that were rendered in the proceedings of deciding on security measure– considering that there are elements of the criminal offence (falsified identity of the claimant), because he is not K.Sh. (Kosovo citizen), but he is A. C. R. Sch., German citizen, with permanent residence and emplacement in the Federal Republic of Germany. Taking into account that the FRG bans two citizenships, the existence of these criminal offences cannot be excluded. Even if two citizenships were allowed, the use of different identities in different countries is not allowed in any way, because the identity is not determined by personal name and in this respect is also determined the personality and legitimacy of a party. It is not about the same person – but about different personalities. How can it be considered a regular procedure, as long as the identity of the parties in the proceedings is not certain?”*
42. The Applicant alleges that the Supreme Court and the Court of Appeal rendered unreasoned decisions: *“The Court of Appeal, except it did not reason its decisions/conclusions, it even did not reiterate the reasoning of the first instance court – and does not give justification as to why it agrees with the*

*reasoning of the first instance court...the Supreme Court of Kosovo reiterated silently all violations of the previous instances, by turning them into continuous violation of human rights and fundamental freedoms by the state judiciary. The Court, inter alia, does not justify at all its decision that there has not been a violation of the formal law and that there has not been a violation of the substantive law."*

43. The Applicant asserts that the Supreme Court (Decision CLM. No. 10/2016 dated 24 August 2016) once again failed to address the central issues raised by him and the State Prosecutor namely: (i) the question of the identity and procedural legitimacy of K.Sh.; (ii) the way the evidence was taken; and, (iii) why the only witness proposed by him was rejected by the courts. The Applicant alleges that in his case in all court instances the principle of equality of arms was violated.
44. The Applicant requests the imposition of interim measures, in accordance with Article 27 of the Law and Rule 54 of the Rules of Procedure. "In this respect, the Applicant emphasizes: *"... I submit to the Constitutional Court of the Republic of Kosovo this request for imposition of the interim measure against all judgments and decisions rendered by the courts because they are in breach of the right to a fair trial and peaceful enjoyment of possessions."*
45. Furthermore, the Applicant specifies these following reasons: (i) the immovable property which was subject to security measures was also subject of mortgage in favor of a third person; (ii) the imposition of security measures on property which was subject to mortgage constitutes a criminal offence; (iii) the Applicant's account (the invalidity pension) through which he secures his medical treatment is blocked, and (iv) the Applicant since 1992 has been diagnosed with 100% invalidity degree, and that therefore, blocking of his invalidity pension will cause him unrecoverable damage.
46. The Applicant stated that due to one sided stand of the courts in his case there has been created a situation of 'continuous violation'. The imposition of security measures against his property and blocking of his pension of invalidity violated moreover his right to property as guaranteed by Article 46 of the Constitution in connection with Article 1 of Protocol No. 1 of the Convention.
47. Furthermore, the Applicant states that: *"I consider that execution of a decision against an invalidity pension which is assistance for medical treatment and to save my life is resulting also in violation of Article 8 of the Convention"*.
48. Finally, the Applicant requests the Court: (i) to declare the Referral admissible, (ii) to hold that there is a violation of Articles 31 [Right to Fair and Impartial Trial], 22.2 [Direct Applicability of International Agreements and Instruments] and 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 6 (Right to fair trial) of the Convention, (iii) to declare invalid the judicial proceedings as a whole and to annul the challenged decisions; (iv) to impose interim measures; and (v) to remand the case before the Basic Court for fresh consideration in accordance with the Judgment of the Constitutional Court.

## Assessment of the request for an interim measure

49. In order for the Court to grant an interim measure in accordance with Article 116 (2) [Legal Effect of Decisions] of the Constitution, Article 27 of the Law and Rule 55 (4), (5) of the Rules of Procedure, it must be determined that:

### *Article 116 (2) of the Constitution*

2. *While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages.*

### *Article 27 of the Law*

1. *The Constitutional Court ex-officio or upon referral of a party may temporarily decide upon interim measures in a case that is subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.*

### *Rule 55 (4) of the Rules of Procedure*

*[...]*

*(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*

*(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and*

*(c) the interim measures are in the public interest.*

### *Rule 55 (5) of the Rules of Procedure (excerpt):*

*[...] no decision granting interim measures may be entered unless the expiration date is specified; however, expiration dates may be extended by further decisions of the Court. [...]*

50. In this respect, the Court notes that the Applicant has submitted extensive arguments regarding the alleged violations of human rights.
51. The Court also notes that the case is of great complexity, related to a numerous proceedings based on the same Decision of the Basic Court which is the initial and final bases for the executive proceedings on the property.
52. As such the Court considers that the Applicant has presented a prima facie case on the merits of the referral within the meaning of Rule 55, paragraph 4, under (a), of the Rules.

53. The Court notes that the Applicant also claims that he must rely on his invalidity pension for his medical treatment and in view of the courts decisions he cannot. The Applicant further claims that the imposition of security measures on his private property will also injure the rights of third persons and as such is unlawful and is a criminal offence.
54. Given these circumstances, the Court considers that there are sufficient reasons to accept that the Applicant would suffer unrecoverable damages within the meaning of the Rule 55, paragraph 4, under b, of the Rules.
55. In addition, the Court notes that the Referral raises serious doubts about the constitutionality of the judicial proceedings, related to : (i) the alleged arbitrariness in assessment of the facts; (ii) the question of identity and procedural legitimacy of K.Sh; (iii) the allegation on violation of the Applicant's right to have his witness heard and his evidence accepted; (iv) the potential adverse repercussions for the Applicant and the third parties in case of implementation of security measures against his property, as well as the blocking of his invalidity pension.
56. The Court notes that the Applicant has raised fair trial concerns in all court instances, namely the non-admission of evidence about the legitimacy of K.Sh. and to have his witness heard, but the courts did not take a stand on those concerns, and as a consequence, have allegedly violated the 'fair balance' which is requisite of equality of arms between the litigants in civil proceedings.
57. Since its Resolution on Inadmissibility in Case no. KI102/16 which declared the Applicant's referral inadmissible due to it being premature, the Court notes that the situation of the Applicant was not remedied, but in fact it appears to become more aggravated and continuous.
58. Moreover, the Court notes that there might be potential unrecoverable damages to the Applicant's right to property and ownership as a consequence of the allegedly continued violation of the right to a fair and impartial trial.
59. Therefore, the Court, without prejudice to any further decision which will be rendered by it, on admissibility or merits of the Referral, grants as grounded the request for interim measure.

## FOR THESE REASONS

The Constitutional Court, pursuant to Article 116 (2) of the Constitution, Article 27 of the Law and Rule 55 (4), (5) of the Rules of Procedure, on 27 March 2017, by majority

## DECIDES

- I. TO GRANT an interim measure, namely, against Judgment C. No. 162/09, of the Basic Court in Prishtina, of 29 October 2013 and estop any judicial proceedings, enforcement proceedings, actions or decisions of public authorities which derive from that judgment until the final decision of the Constitutional Court of the Republic of Kosovo;
- II. TO GRANT an interim measure until 20 June 2017;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in accordance with Article 20.4 of the Law; and
- V. This Decision is effective immediately.

**Judge Rapporteur**



Snezhana Botusharova



**President of the Constitutional Court**

  
Arta Rama-Hajrizi