



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

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Prishtina, 13 December 2012  
Ref. No.:VMP/AP/328 /12

**DECISION ON THE REQUEST FOR INTERIM  
MEASURES AND THE RESOLUTION ON  
INADMISSIBILITY**

in

**Case No. KI 126/12**

Applicant

**Bekë (Vesel) Gashi**

**Constitutional Review of the Supreme Court Judgment, Mlc. no. 21/2012,  
dated 8 November 2012**

**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  
Arta Rama-Hajrizi, Judge.

## **Applicant**

1. The Applicant is Mr. Bekë (Vesel) Gashi, residing in the village Qyshk, Municipality of Peja.

## **Challenged decision**

2. The Applicant challenges the Supreme Court Judgment, Mlc. no. 21/2012, of 8 November 2012, which was served on the Applicant on an unspecified date.

## **Subject matter**

3. The Applicant claims that the abovementioned Judgment violates his rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Articles 2 [Sovereignty], 24 [Equality Before the Law], 31 [Right to a Fair and Impartial Trial] and 102 [General Principles of the Judicial System].
4. Furthermore, the Applicant claims that the abovementioned judgment also violates "*Article 6.1 of the European Convention on the Rights of the Child and other provisions of the Convention for the protection of the rights of children.*"
5. Moreover, the Applicant requests from the Constitutional Court of the Republic of Kosovo (hereinafter, the Court) to impose temporary interim measures.

## **Legal basis**

6. The Referral is based on Article 113.7 of the Constitution, Article 22 and 27 of the Law on Constitutional Court of the Republic of Kosovo, of 15 January 2009, (No. 03/L-121) (hereinafter, the Law), Rule 54 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules).

## **Proceeding before the Court**

7. On 7 December 2012, the Applicant submitted his Referral to the Court.

8. On 7 December 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of judges Kadri Kryeziu (Presiding), Enver Hasani and Arta Rama-Hajrizi.
9. On 7 December 2012, the Referral was communicated with the Supreme Court of the Republic of Kosovo and the Ministry of Justice.
10. On 10 December 2012, the Court deliberated on the Preliminary Report of the Judge Rapporteur with regard to the request on interim measure and the admissibility of the Referral.

### **Summary of facts**

11. On 11 January 2011, the Family Court in Hannover, Germany, rejected (Decision 614 F 117/11) the Applicant's request for custody over his two minor children.
12. On 10 February 2011, the Family Court in Hannover, Germany, decided (Decision 614 F 725/11) that the two minor children will reside temporarily with the mother and the Applicant's request of transferring the residence of the children from the mother to him was rejected.
13. On 2 November 2011, the German Federal Ministry of Justice, acting in its capacity as the German central authority according to the Hague Convention of 25 October 1980 on the civil aspects of international child abduction, filed a request with the Ministry of Justice of the Republic of Kosovo for ordering the return of the Applicant's two minor children.
14. On 31 October 2011, the Municipal Court in Peja (Decision C. no. 229/11) dissolved the marriage through agreement.
15. On 6 December 2011, the Ministry of Justice of the Republic of Kosovo, acting in its capacity as the Kosovo central authority according to the Hague Convention of 25 October 1980 on the civil aspects of international child abduction, notified the Applicant that, by keeping the two minor children with him, he is denying the mother's parental right over the two minor children and that this is in contradiction with the applicable German law, with the Hague Convention of 25 October 1980 on the civil aspects of international child abduction and with the Law, No.03/L -238, on the Civil Aspects of International Child Abduction. Furthermore, the Ministry of Justice of Kosovo held that, if the Applicant did not respond within seven days, then they will initiate court proceedings.

16. On 29 December 2011, the Municipal Court in Peja (Decision E. no. 805/11) approved the request of the mother to execute the decision of the Family Court in Hannover, Germany.
17. The Ministry of Justice of the Republic of Kosovo, pursuant to the Hague Convention of 25 October 1980 on the civil aspects of international child abduction and the Law No.03/L –238 on the Civil Aspects of International Child Abduction, requested the District Court in Prishtina (Article 1 (1.8) of the Law No.03/L –238 on the Civil Aspects of International Child Abduction) to issue an order securing the return of the two children to Germany.
18. On 10 February 2012, the District Court in Prishtina rejected (Decision C. no. 1/2012) the request of the Ministry of Justice of Kosovo. The District Court in Prishtina held that the children are young and “[...] should be protected from all stress in order for them to develop properly physically and physiologically. Hence, according to the Courts evaluation the children in Kosovo with their father have conditions for a normal life, without taking into consideration the fact that in Kosovo the children are without the approval of the mother as a temporary custodian. Based on the abovementioned the concrete case cannot be determined as a case as international child abduction pursuant to Article 3 of the Law on the Civil Aspects of International Child Abduction.” Furthermore, the District Court in Prishtina held that “[...] the temporary decision of the Municipal Court in Hannover of 22 February 2011 [...] was taken while they were married, the final decision on custody should have been taken after the marriage was dissolved. Furthermore, this is foreseen by the Law on Family in Kosovo since the marriage was entered into in Kosovo.” The attorney of the mother filed a complaint to the Supreme Court against this decision.
19. On 11 June 2012, the Supreme Court rejected (Ac. no. 40/2012) the complaint against the decision of the District Court in Prishtina as unfounded. The Supreme Court held that the attorney of the mother does not have a power of attorney and has no right to file a complaint against the decision of the District Court in Prishtina. Only the Ministry of Justice has the right to file a complaint against the decision of the District Court in Prishtina.
20. On 6 July 2012, the Applicant’s attorney received an invitation by the Family Court in Hannover to participate on 16 August 2012 in the custody case over the children.

21. On 10 August 2012, the Municipal Court in Peja (C. no. 626/12) imposed protective measures (interim measure) and the Applicant was obliged to return the children to the mother.
22. On 14 August 2012, the District Court in Peja (Ac. no. 447/12) annulled the decision of the Municipal Court in Peja.
23. On 16 August 2012, the District Court in Prishtina (C. no. 2/2012) upon the request of the Applicant and pursuant to Article 15.1.1 of the Law on the Civil Aspects of International Child Abduction imposed interim measures for thirty days stopping the return of the children to the mother and allowed the Ministry of Justice to initiate court proceedings during the interim measure. The mother complained against this decision to the Supreme Court.
24. On 25 September 2012, the Supreme Court annulled (Decision Ac. no. 61/2012) the decision of the District Court in Prishtina because pursuant to Article 15.1.1 of the Law on the Civil Aspects of International Child Abduction interim measures can be imposed upon the request of the Ministry of Justice or the Court *ex officio* and not by the Applicant. Furthermore, the Supreme Court held that the issue of temporary custody is determined with the decision of the Family Court in Hannover which is final and binding.
25. On 16 October 2012, the request of the Ministry of Justice of the Republic of Kosovo (C. no. 4/2011) to return the two minor children to the mother was rejected because the case is *res judicata* with the Decision of the District Court in Prishtina (Decision C. no. 1/2012) of 10 February 2012.
26. On 8 November 2012, the Supreme Court (Mlc. No. 21/2012), upon the request of the State Prosecutor for protection of legality amended the Decision of the District Court in Prishtina C. no. 1/2012 of 10 February 2012, and the Decision of the Supreme Court Ac. no. 40/2010 of 11 June 2012, approving the request of the Ministry of Justice of Kosovo as founded and obliging the Applicant to return the children to their mother.
27. On 26 November 2012, the mother was invited by the Family Court in Hannover to participate on 20 December 2012 in the custody case over the children.

28. On 30 November 2012, the request of the Ministry of Justice of the Republic of Kosovo for return to previous situation and repetition of the procedure (C. no. 1/2012) was rejected because the case is *res judicata* with the Decision of the District Court in Prishtina (Decision C. no. 1/2012) of 10 February 2012.
29. The Supreme Court held that *“With Article 3 of the Law on the Civil Aspects of International Child Abduction the removal or the retention of a child is wrongful where it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention. In the concrete case we have to do with the violation of the right of the mother as custodian in respect to the removal or wrongful retention of the minor children pursuant to Article 3 paragraph 1.1 of this Law, because the custody right of the mother is based on the decision of the Municipal Court in Hannover (Family Court).” “[...] When the right to custody emerges from a judicial decision or administrative, the Court needs to take into account the decision issued by the authorities of the state where the children have had their permanent residence before their abduction [...]”*. The Supreme Court also held that *“The right to custody has not been determined by the law of Kosovo but by a foreign decision, hence the decision in respect to custody, that has been taken in Kosovo, is not a ground for refusing to return a child under this law, but the Court may take account of the reasons for that decision in applying the provisions of this law.”*

### **Allegations of the Applicant**

30. The Applicant alleges what follows.
- (i) *“Violation of international standards on human rights for a fair and lawful judicial procedure by an independent and impartial court in providing justice”*
- The Applicant claims that *“With the challenged decision of the Supreme Court of the R. of Kosovo there has been numerous violations of international standards on human rights, in particular of the European Convention for Human Rights and other international standards, such as those of UN which guarantees a fair process, impartial, based on law etc. and Article 6 of ECHR that concerns with the right of the complainant for a fair process and impartial and for good administrative justice. Based on the interpretation of Article 6.1*

*of this Convention, the European Court of Human Rights clearly determines that access to Court has to be real and not simply formal. According to the UN declaration on the rights of children, the declaration on the social and legal principles that has to be implemented for the protection and wellbeing of children, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*

(ii) *“Violation of the Constitution of the Republic of Kosovo, Articles 3, 24, 31 and 102”*

- Applicant states that *“the Court should have taken into account the interest of the minors, their physical and physiological development, their health and education, interests that are primary when taking a decision.”*

31. In sum, the Applicant claims that Articles 2 [Sovereignty], 24 [Equality Before the Law], 31 [Right to a Fair and Impartial Trial] and 102 [General Principles of the Judicial System] of the Constitution have been violated by the Supreme Court Judgment.

### **Request for interim measure and admissibility of the Referral**

32. In the present case, the Applicant requests from the Court to impose interim measures on the execution of the judgment of the Supreme Court Mlc. No. 21/2012 of 8 November 2012 until the final adjudication of the Referral. The Applicant does not provide any further argument on why the Court should impose interim measures.

33. In this respect, the Court takes into account that, in accordance with Rule 55 (1) of the Rules, *“A request for interim measures shall be given expedited consideration by the Court and shall have priority over all other referrals.”* and also Rule 55 (6) *“[...] The recommendation of the Review Panel on the application for interim measures shall become the decision of the Court unless one or more Judges submit an objection to the Secretary within three (3) days. [...]”*.

34. Article 116.2 [Legal Effect of Decisions] of the Constitution establishes:

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*

35. Also Article 27 of the Law provides;

*“The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a 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.”*

36. In addition, in order for the Court to grant interim measure pursuant to Rule 55 (4) of the Rules of Procedure, it must find, namely, that:

*“(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*

*(..)*

*If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application.”*

37. The Court recalls Article 48 of the Law that establish that

*“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”.*

### **A prima facie case**

38. The Court notes that the Family Court in Hannover decided that the two minor children will reside temporarily with the mother and the Applicant’s request of transferring the residence of the children from the mother to him was rejected.



39. Thus, the Court considers that an alleged violation of the right to a fair and impartial trial of the Applicant should have been complained before the Family Court in Hannover, which decided on the custody of the two minor children.
40. The Court also considers that the allegation on the violation of Articles 2 [Sovereignty], 24 [Equality Before the Law], and 102 [General Principles of the Judicial System] of the Constitution is manifestly ill-founded. By virtue of the Hague Convention of 25 October 1980 on the civil aspects of international child abduction and the Law No.03/L –238 on the Civil Aspects of International Child Abduction, the decision of the Family Court in Hanover is directly applicable in the Kosovo territory without a need for an exequatur procedure.
41. In fact, Kosovo regular courts are not competent to assess the merits of that decision; they are only competent for the execution of the decision of the German family court, pursuant to Article 3 (1.1) of the Law on the Civil Aspects of International Child Abduction, which provides: “The removal or the retention of a child is wrongful where it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention” and Article 11 of the same law which provides “The Court shall mandatory order the return of a child from Kosovo to Requesting State if the child has been wrongfully removed to or retained in Kosovo”
42. For that reason, the Supreme Court correctly concluded that *“The right to custody has not been determined by the law of Kosovo but by a foreign decision, hence the decision in respect to custody that has been taken in Kosovo, is not a ground for refusing to return a child under this law”*.
43. The Supreme Court also took into account that *“When the right to custody emerges from a judicial decision (...), the Court needs to take into account the decision issued by the authorities of the state where the children have had their permanent residence before their abduction”*.
44. The Court notes that “the removal or the retention of a child is wrongful where: (1) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (2) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been

exercised with an exemption of the removal or retention”. (See Article 3 of the Law on the Civil Aspects of International Child Abduction and of the Convention on the Civil Aspects of International Child Adduction)

45. The Court further notes that, for a prima facie case on the merits of the request on interim measures and on the admissibility of the referral, the Applicant must show that the proceedings in the Supreme Court, viewed in their entirety, have not been conducted in such a way that the Applicant has had a fair trial or other violations have been committed by the Supreme Court.
46. In this respect, the Court refers to Rule 36 (1.c) of the Rules of Procedure which provides that “*The Court may only deal with Referrals if: c) the Referral is not manifestly ill-founded.*”
47. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the Supreme Court, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
48. Thus, the Court is not to act as a court of fourth instance, when considering the decisions taken by regular courts. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).
49. Moreover, the Applicant merely alleges a “*Violation of international standards on human rights for a fair and lawful judicial procedure by the Supreme Court.*”
50. As a matter of fact, the Applicant does not substantiate a prima facie claim on constitutional grounds and did not provide evidence showing that his rights and freedoms have been violated by Supreme Court.
51. Thus, the Constitutional Court cannot conclude that the relevant proceedings in the Supreme Court were in any way unfair or tainted by arbitrariness (see mutatis mutandis, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).
52. Furthermore, there is no room for alleging such violation, as the Supreme Court is not dealing with the merits of the case, but only ordering the execution of a decision regularly and legally taken by the competent court in Germany.
53. Therefore, the Applicant did not show prima facie why and how the Supreme Court violated his rights as guaranteed by Articles 2 [Sovereignty], 24 [Equality Before the Law], 31 [Right to a Fair and Impartial Trial] and 102 [General Principles of the Judicial System] of the

Constitution or that “*numerous violations of international standards on human rights, in particular of the European Convention for Human Rights and other international standards*” have been committed by the Supreme Court.

### **Unrecoverable damages**

54. In this respect, the Court notes that pursuant to Article 22 [Direct Applicability of International Agreements and Instruments] the Convention on the Rights of the Child is directly applicable in the territory of Kosovo.
55. Furthermore, the Court is aware that Article 3 (1) of the Convention on the Rights of the Child establish that
- “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.*
56. Also Article 5 of the Convention on the Rights of the Child determines that
- “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention”.*
57. To this end, the Law No.03/L –238 on the Civil Aspects of International Child Abduction is to secure the prompt return of children who have been wrongly removed from or retained outside their State of habitual residence and to ensure respect for rights of custody of and access to children who are residents in Kosovo or a Requesting State.
58. As said above, the removal or the retention of a child is wrongful where it is in breach of rights of custody attributed to a person under the law of the State in which the child was habitually resident immediately before the removal or retention.
59. Moreover, as correctly held by the judgment of Supreme Court, the fact that a decision relating to custody has been made in Kosovo, is not a

ground for refusing to return a child to the situation previously established by the only competent German court.

60. The Court considers that, before the foregoing, the most relevant and primary interest to be protected in the case is the best interests of the two children, as decided by the Family Court in Hanover, Germany.
61. On the other side, the Court notes that the Applicant has not shown what his interests were that would suffer unrecoverable damages if the interim relief is not granted.
62. In fact, the Court notes that the Applicant merely states that the Court should impose temporary interim measures until the final adjudication of the Referral, without providing any further argument or relevant documents explaining and showing why and how he himself would suffer unrecoverable damages.
63. In all, the Court concludes that the Applicant has neither built nor shown a prima facie case either on the merits or on the admissibility and, therefore, the request on interim measures must be rejected as ungrounded and the Referral declared inadmissible as manifestly ill-founded. The Court further concludes that, the referral being inadmissible, the request for interim measures is without object and must be rejected.

### **FOR THESE REASONS**

The Constitutional Court, pursuant Article 116 (2) of the Constitution, Articles 27 and 48 of the Law, and in accordance with Rules 36 (1.c), 55 and 56 (2) of the Rules, on 10 December 2012, unanimously,

### **DECIDES**

- I. TO REJECT the Referral as Inadmissible;
- II. TO REJECT the request for interim measures;
- III. TO NOTIFY this Decision to the Parties; and
- IV. TO PUBLISH this Decision in accordance with Article 20(4) of the Law.
- V. This Decision is effective immediately.

**Judge Rapporteur**



Almiro Rodrigues



**President of the Constitutional Court**



Prof. Dr. Enver Hasani