



REPUBLIKA E KOSOVËS – РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

**Pristina, 14 March 2013
Ref. No.:RK 388/13**

DECISION ON THE REQUEST FOR INTERIM MEASURES

in

Case No. KI 17/13

Applicant

Bujar Bukoshi

**Constitutional Review of the Decision of the District Court in Prishtina,
Ka, No. 562/12 of 8 October 2012**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Applicant is Bujar Bukoshi, former Minister of Health, residing in Prishtina, represented by Besnik R. Berisha, a lawyer from Prishtina.

Challenged Decision

2. The Applicant request the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") to review the Decision, Ka. No. 265/12, of the District Court in Prishtina, adopted on 8 October 2012, which was served on the Applicant on 10 October 2012.

Subject matter

3. The subject matter of the Referral is the assessment of the Constitutionality of the Decision, Ka. No. 265/12, of the District Court in Prishtina, which confirmed the indictment against the Applicant. The Applicant claims that the allegations against him in the indictment are unconstitutional, since the actions and decision that he has taken fall within the scope of competences as a Minister of Health.
4. The Applicant further request the Court to impose interim measures suspending the criminal investigations against him until this Court takes the final decision.

Legal basis

5. Article 113.7 of the Constitution, Articles 22, 48 and 49 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the "Law") and Rules 54, 55 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

6. On 11 February 2013, the Applicant submitted the Referral to the Court.
7. On 13 February 2013, the Applicant submitted additional documents to the Court.
8. On 25 February 2013, the President of the Court, with Decision No. GJR. KI. 17/13, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Court, with Decision No. KSH. KI. 17/13, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Ivan Čukalović and Kadri Kryeziu.

9. On 8 March 2013, the Constitutional Court through a letter informed the Applicant that the Referral had been registered.
10. On the same date, the Referral was communicated to the Appellate Court in Prishtina as a successor of the District Court in Prishtina.

Summary of facts according to the Applicant

11. On 16 July 2012, the EULEX Special Prosecutor submitted to District Court in Prishtina the amended Indictment, PPS No: 64/11, 465/09 and 424/09, which accused the Applicant for the criminal offence of misuse of official duty or authorizations, punishable by Article 339, paragraphs 1 and 3, in conjunction with Article 23 of the Criminal Code of Kosovo, for which it is foreseen a sentence with imprisonment from 1 to 8 years.
12. The District Court in Prishtina, on 3 and 5 September 2012 held sessions for confirmation of the indictment. During the hearing of 3 September, the defence council of the Applicant raised the issue of functional immunity during Applicant's tenure as Minister of Health.
13. On 11 September 2012, the Judge responsible for confirmation of the indictment, by Decision Ka.No.562/12, rejected the request of the defence council to take into consideration the safeguard provided for in Article 98 of the Constitution. The Judge reasoned that the accusation for the misuse of the official duty did not fall within the scope of responsibility as Minister of Health.
14. On 14 September 2012, the Defence Counsel of the Applicant filed an appeal against the above Decision with the Criminal Panel of three Judges. The Applicant argued that the acts and decisions he took, for which later he was charged criminally, were in his capacity as the Minister of Health.
15. On 18 September 2012, the Panel of District Court, by the Decision Ka.No.562/12, rejected the Appeal as ungrounded regarding the immunity of the Applicant as the former Minister of Health.
16. On 8 October 2012, Judge responsible for the confirmation of indictment issued Decision KA. Nr. 265/12, which confirmed the indictment of Special Prosecutor and the trial started.

Applicants' arguments

17. The Applicant in his Referral claims that Article 98 and Article 23 of the Constitution are violated.

18. Article 98 [Immunity] of the Constitution provides that:

“Members of the Government shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of responsibilities as members of the Government.”

19. In this respect, the Applicant claims that he had functional immunity for all actions and decisions that he took as Minister of Health in the Government of the Republic of Kosovo and they were in accordance with the applicable law in Kosovo. Hence he cannot be criminally prosecuted.

20. Article 23 [Human Dignity] of the Constitution offers protection of human dignity of the person, by stipulating that:

“Human Dignity is inviolable and is basis of all human rights and fundamental freedoms.”

21. In this respect, the Applicant claims that the confirmation of the indictment was made public and this damaged his reputation, thus violating his human dignity

Request for Interim Measures

22. In the present case, the Applicant requests from the Court to impose interim measure suspending the criminal proceedings against him in the regular courts, until the final adjudication of the referral.

23. 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. [...]”*.

24. 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

25. Article 27 of the Law also 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.”

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

27. The Court notes that the case is under consideration by the regular court, where the Applicant will be able to raise his complaints about the alleged violation of his rights.
28. The Constitutional Court reiterates that it is not a court of facts, and it is within the regular courts’ competences, at this stage, to collect and assess the evidences, and to decide whether the acts and decisions taken by the Applicant fall within the scope of the Minister of Health, which is protected by functional immunity and to adjudicate accordingly.
29. The Constitutional Court therefore, without prejudice to any further decision to be made by the Court on admissibility or on the merits in the future, on 14 March 2013, by majority of votes

DECIDES

- I. TO REJECT the request for Interim Measures;
- II. This Decision shall be notified to the Parties; and
- III. This Decision shall be published in accordance with Article 20(4) of the Law and is effective immediately.

Judge Rapporteur

Snezhana Botusharova



President of the Constitutional Court

Prof. Dr. Enver Hasani