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

Pristina, 5 July 2013
Ref.No.:AGJ455/13

JUDGMENT

in

Case No. KI 52/12

Applicant

Adije Iliri

Constitutional Review of the Decision of the Supreme Court of the Republic of Kosovo, Ac. no. 95/2011, dated 8 December 2011

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 Mrs. Adije Iliri, with permanent residence in Austria, represented by Mr. Albert Islami, a practicing lawyer from Pristina.

Challenged decision

2. The Applicant challenges the Supreme Court decision, Ac. no. 95/2011, of 8 December 2011, which was served on her on 14 January 2012.

Subject matter

3. The subject matter of the Referral is the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") of the constitutionality of the above Supreme Court decision, by which, allegedly, her rights guaranteed under Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") as well as under Article 6 (Right to fair trial) of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: the "ECHR") have been violated.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (hereinafter: the "Law"), and Rule 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 11 May 2012, the Applicant submitted the Referral to the Court.

6. On 17 May 2012, the Referral was communicated to the Supreme Court.

7. On 4 July 2012, the President of the Court, with Decision No.GJR.KI-52/12, appointed Judge Ivan Čukalovič as Judge Rapporteur. On the same date, the President of the Court, with Decision No.KSH.KI-52/12, appointed the Review Panel composed of Judges Almiro Rodrigues (Presiding), Snezhana Botusharova and Kadri Kryeziu.

8. On 25 July 2012, the Court requested additional information from the Applicant, who submitted it on 31 July 2012.

9. On the same day, the Referral was communicated to the Ministry of Justice.

10. Still on the same day, the Court requested additional information from the District Court in Prizren, which replied on 7 August 2012 that *"after reviewing the case files, we have concluded that the invitation for participation in the session dated 13.07.2009 was not sent to Ms. Adije Iliri."*

11. On 18 October 2012, the Court deliberated on the case and decided to postpone it until a future session. The main issue that was discussed was whether there existed a decision on custody of the Applicant's children by the Austrian authorities. However, based on the documents submitted there is apparently no such decision.

12. On 5 July 2013, the Court deliberated and voted on the merits of the case.

Summary of facts

13. The Applicant got married in 1995 in Studencan, Kosovo, and in 1998 settled down with her husband in Austria, where their three children were born. The parents and children possess both Austrian and Kosovar citizenship and had permanent residence in the Fischerstrasse in Ried im Innkreis in Austria.

14. In February 2009, after marital problems had arisen between them, the Applicant and her husband together with the children went on a family visit to Kosovo. In early March 2009, the Applicant was apparently forced to stay with her parents, while her husband and children remained at the house of his parents.

15. On 3 March 2009, the Applicant's husband went back to Ried im Innkreis, Austria in order to relinquish the family's residence. On 19 March 2009, he apparently deregistered himself and the children out.

16. Not being able to exercise her parental rights, the Applicant travelled back to Austria in order to initiate proceedings for the return of her children.

17. On 26 March 2009, at the session of the District Court in Ried im Innkreis, Austria, the Applicant made a statement about the events and requested the Court to be entrusted with the custody of her three minor children.

18. As mentioned in the Protocol of the court session of 26 March 2009, the Applicant declared, inter alia:

> ["...]
> *In January of this year, my parents-in-law came from Kosovo to visit us in Ried im Innkreis. My parents in law saw tensions between myself and my partner, the father of the children, and thought that if I go on a vacation in Kosovo to relax, our relations would improve. On 26.02.2009, the trip to Kosovo was planned, while in fact we travelled on 27.02.2009, by bus to Kosovo, and I took my two daughters G. and D. with me.*
>
> *The next day – without any notice – I saw my husband coming there together with our son. I was surprised, because he had taken everything with him, all the toys and clothes of children. He told me that from now on I should always stay in Kosovo. Ultimately, we agreed that A., our son, would first attend an Albanian school, and that we would then see after the summer, where we want to stay.*
>
> *On 2 March 2009, I wanted to visit my family and went there with the three children and my father-in-law. Two hours later, my father-in-law came to pick me up together with my children. He told me that my husband wanted to say good-bye to the children, because he was going back to Austria. That is why we went back to my parents-in-law. Then my husband took the*

children and told me that he wanted to buy some gifts for them. I waited in the house of my parents-in-law for the children.

But after some time, my father-in-law, my brother in law and a cousin of my husband told me to get ready, because we were leaving and that I had nobody left at their place, neither my husband nor the children.

Since that moment, I have never seen my children again.

I then had serious psychological problems; a doctor prescribed medicines and gave me an infusion. The parents-in-law then wanted to resolve the whole matter according to Albanian tradition. I was afraid that the children would then stay with the father and, since nothing in those 14 days had changed for me to the better, I decided to return to Austria in order to fight for my children.

From the information I have, the children continue to reside in the house of my parents-in-law.

In the meantime, my husband went again to Austria and dispensed of the apartment in the Fischerstrasse. He also deregistered me and the children
[...]
My husband deregistered our eldest son from the school here in Austria and enrolled G. and A. into a school in Kosovo.
[...]

I believe that it would be best for the children to come back to Austria soon. They are all born in Austria and are socially integrated here.
[...].

19. The Protocol of the District Court in Ried im Innkreis further mentioned that the District Court informed the Applicant that, based on a telephone call with the Austrian Federal Ministry of Justice, the request for return, according to the Hague Convention on civil aspects of international child abduction (hereinafter: the "Hague Convention"), would be senseless, since Kosovo was not a party to that Convention.

20. According to the Protocol, the Applicant was further notified by the District Court that a phone call with the Federal Ministry of Foreign Affairs had made clear that an intervention by the Ministry of Foreign Affairs would not be possible, when the father has dual citizenship. Since legal remedies are sparse, only the submission of a request for the, in any case, temporary transfer of the custody, would be possible.

21. The Protocol then mentioned that, as a consequence, the Applicant filed with the Austrian District Court a request to be entrusted with the custody of her three minor children, A., G. and D.

22. On 21 April 2009, the Austrian District Court called for a session, where it informed the Applicant that, according to information provided by the Federal Ministry for European and International Affairs on 15 April 2009, in the

concrete case of child custody, it would be possible to file a request as per the Hague Convention.

23. As mentioned in the Protocol, the District Court then assisted the Applicant, in connection with her request for return, to complete the form recommended by the Hague Conference [Convention]. The Protocol was signed by the Judge and the representative of the Federal Minister of Justice of Austria.

24. By letter of 25 May 2009, the Austrian Federal Ministry of Justice; acting in its capacity as the Austrian central authority according to the Hague Convention (No. BMJ-C935.233/0001-I 10/2009) with the Kosovo Ministry of Justice for the return of the Applicant's three minor children who were believed to be staying with their father. The Austrian Federal Ministry of Justice held that "The parents who are both Austrian citizens are still married and according to article 144 of the Austrian civil code have joint custody of the children."

25. On 5 June 2009, the Kosovo Ministry of Justice wrote to the Applicant's husband requesting him to voluntarily return the children to the Applicant, in accordance with paragraph (c) of Section 3 [General proceedings] of UNMIK Regulation No. 2004/29 on Protection against International Child Abduction of 5 August 2004 (hereinafter: "UNMIK Regulation No. 2004/29"). No reply was received, however.

26. On 26 June 2009, the Kosovo Ministry of Justice upon the request (No. MBJ-C935-233/0001-I 10-2009) of the Austrian Ministry of Justice filed a request with the District Court in Prizren asking it to issue an order securing the return of the children to Austria, pursuant to Article 4.1 and Article 3.3(c) of UNMIK Regulation No. 2004/29,

27. The Kosovo Ministry of Justice further requested the District Court to initiate judicial proceedings on the basis of Article 4.4.1 of the Hague Convention which was applicable in Kosovo in accordance with Article 145 of the Constitution.

28. On 2 July 2009, the President of the District Court in Prizren notified the District Chief Public Prosecutor of the request of the Ministry of Justice of the Republic of Kosovo, based on the request of the Ministry of Justice of the Republic of Austria, to take action in the international abduction case of minor children A., G. and D., abducted by their father A.I.

29. Pursuant to Section 4.2 of UNMIK Regulation no. 2004/29, the President of the District Court also filed with the District Chief Public Prosecutor a copy of the request of the Ministry of Justice of the Republic of Kosovo, together with all other files, in order for the Prosecutor to take the necessary action within his competence by virtue of the Regulation, and to notify the court thereof in order to enable the latter to render decisions and orders within the meaning of this Section.

30. On the same day, the President of the District Court in Prizren informed the Commander of the Police Station in Prizren that a hearing on the request of the Kosovo Ministry of Justice in the abduction case had been scheduled for 9 July 2009 and requested him to deliver to the Applicant's husband the summons for the hearing.

31. On 9 July 2009, the District Court in Prizren held a hearing in relation to the request for legal aid in relation to the abduction case in the presence of the Applicant's husband who had authorized a lawyer from Suhareka to represent him in the matter. From the minutes of the hearing it appears that the Applicant's husband, as the respondent, was also heard about the substance of the abduction case.

32. On 13 July 2009, the hearing of the District Court in Prizren continued in the presence of the Applicant's husband, who, according to the minutes of the hearing, filed as evidence, inter alia, the Protocol of the District Court in Ried im Innkreis, Austria, containing the statement given by the Applicant to that Court.

33. On the same day, the District Court in Prizren, handed down its decision No. I. Agj.no.2/2009-16, rejecting the request of the Kosovo Ministry of Justice, holding that *"[...] pursuant to the Convention of the Hague on Civil aspects of International Abduction of Children (1991) and UNMIK Regulation 2004/29 in which the principles of the abovementioned Convention are embodied, that no abduction of the children has taken place [...], since the father has brought the children from Austria to Kosovo in a legal way and has not hidden himself from the state authorities, since he immediately responded to the court's invitation and has also communicated with the relevant bodies in the Republic of Austria, which can be even be seen in the letter addressed to the District Court in Reid im Innkreis in the Republic of Austria."*

34. Apparently, the Ministry of Justice of Kosovo did not appeal against the decision of the District Court in Prizren, but the Public Prosecutor of Kosovo did so by filing a request for protection of legality against the decision with the Supreme Court.

35. On 10 November 2009, the Supreme Court, by Decision Mlc. no. 19/2009, held that the request for protection of legality was grounded and quashed the decision of the District Court in Prizren, by returning the case to the court of first instance for retrial. The Supreme Court held that *"[...] the appealed decision is contradictory [...]* and that *[...] the request for protection of legality rightly stated that the appealed decision constitutes essential violations of provisions of contentious procedure pursuant to Article 182.1 n of the Law on Contentious Procedure, which consist in the absence of reasons regarding crucial facts, but that even the reasons given are in contradiction between themselves and with the evidence in the case file. When retrying the case, the court of second instance is obliged to avoid the abovementioned violation and to take into consideration other allegations from the request for protection of legality.*

36. On 19 January 2010, the District Court in Prizren, by Decision I.Agj.no. 2/2009-16, retried the request of the Ministry of Justice of Kosovo of 26 June 2009, based on the request of the Ministry of the Republic of Austria to return the minor children, but rejected it once more. As part of the evidence, the court, inter alia, read out the Protocol of the District Court in Ried im Innkreis which contained the statement of the Applicant as well as the reports submitted by the Center for Social Work in Suhareka.

37. The District Court in Prizren reasoned that *"according to its assessment, regardless of the provisions of the Article in question* [Article 3 of the Hague Convention], *it is not obligated to order the return of a child pursuant to Article 13(b) when there exists a serious risk that the return of children will expose the children to physical or psychological damage or put a child in front of an intolerable situation. Starting from the fact that the children since the divorce are under the care of their father [...] and have created a strong emotional bond with him and attend school in Kosovo, in the concrete case there is a serious risk that the return of the children will have a negative impact on their psychological and physical development".*

38. The District Court referred to the findings of a Certificate issued by the Center for Social Work in Suhareka, referring to the problematic marital relations between the Applicant and her husband and the divorce proceedings initiated by the husband. The Certificate further mentioned that the children were now within the care and education of the father who lives with his parents and that the mother of the children was far away in Austria.

39. On 3 February 2010, the Kosovo Minister of Justice wrote to the State Prosecutor asking him *"[...] to take the necessary action in accordance with applicable law in Kosovo, and file an appeal with the Supreme Court of Kosovo, through the District Court in Prizren, in order to change Decision no.I.Agj.No.2/2009 rendered by the District Court in Prizren on 19 January 2010,."*

40. The Minister of Justice, inter alia, stated that the District Court in Prizren [...] had rejected the request of the Austrian authorities to return the minor children [...] for the following reasons:

    "According to the assessment of the District Court in Prizren, independently of Article 3 of the Convention on Civil Aspects of International Child Abduction, the court is not bound to order the return of the children, as per Article 13(h), when there is a serious risk that the return of the children shall expose the children to physical or psychological damage, or put the child in an intolerable situation. Taking into account the fact that the children have been under then care of the father A.I., since the termination of the marital union and that they have created a strong bond with the father and are attending school in Kosovo, there is a serious risk that the return of the children will have a negative influence on their psychological and emotional development.

The decision rendered by the District Court in Prizren is in violation of the purpose and objective of the Convention, which clearly provides that the objective of the Convention is to ensure rapid and safe return of children to the state from where they were unjustly displaced, in this case the Austrian state. Furthermore, the purpose and objective of the Convention is to ensure that custody and contact rights, according to the laws of the contracting states, are observed effectively in other countries where this Convention is applicable.

Furthermore, the District Court in Prizren, in reaching its decision, has not justly analysed Article 3 of the Convention, which clearly provides for the conditions to be met for considering the removal as unjust displacement and holding. Mr. Alban Iliri has acted in violation of Article 3 of the Convention, by violating the custody rights given to a person, in this case Mrs. Adije Iliri, according to the laws of the state where the children were permanent residents before their displacement or holding. It is undisputable that the permanent residence of both Mr. Alban Iliri, and Mrs. Adije Iliri, was in the Austria and that both had joint custody over their minor children.

Also, in accordance herewith, Article 12 of the Convention provides that where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

The Minister of Justice also drew the attention of the Chief Prosecutor to the fact that Article 13(3) of the Hague Convention, provides that *"In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence"*. In the Minister's opinion, the District Court in Prizren basing itself on the facts contained in the Report of the Center for the Social Work in Suhareka of 15 December 2009, concluded that the children were under the care of the father, whereas, in the present case, such a report should have been provided by the state where the child enjoyed permanent residence, i.e. Austria, and not the Center for Social Work in Suhareka.

41. Thereupon, the Chief Prosecutor filed a request for protection of legality with the Supreme Court, stating that the District Court had erroneously applied the Hague Convention. He proposed to the Supreme Court that the challenged decision be squashed and the case be returned for retrial.

42. On 10 June 2010, the Supreme Court, by Decision Mlc.2/2010, rejected the request for protection of legality as ungrounded and confirmed the decision of the District Court in Prizren. According to the Supreme Court, it resulted from the case file that the father had initiated divorce proceedings and that the children, who had been brought to Kosovo with the consent of their mother,

were now under the care of the father in Studencan in the municipality of Suhareka.

43. The Supreme Court accepted as fair and legal the decision of the District Court, by which the request of the Ministry of Justice of the Republic of Kosovo dated 26 June 2009, based on the request of the Ministry of Justice of the Republic of Austria to return the children to their mother in Austria, was rejected and admitted, in its entirety, the reasoning and factual conclusions of the District Court. In the Supreme Court's opinion, the legal stance of the District Court was to be considered fair, due to the reasons that it had previously been confirmed that the return of the children to stay within the care of their mother in Austria presented a real danger that the children would suffer psychological damage by putting them in an intolerable situation, since they were now more than one year in Kosovo and had become familiar with the environment in which they were living and attending school. Moreover, according to the Supreme Court, the decisiveness of the eldest child, who had just turned ten, not to return to his mother and stay within her care in Austria, should be taken into account.

44. The Supreme Court concluded that, due to the above reasons, it also considered that, pursuant to Article 1.3 of the Hague Convention, the District Court in Prizren was not obliged to order the return of the children. Moreover, since in the meantime, after the children's return to Kosovo, divorce proceedings had been initiated, ultimately it would be decided to which parent the children would be entrusted and what their contact would be with the other parent.

45. Thereupon, the lawyer of the mother filed a proposal for repetition of procedure with the Supreme Court, which was dealt with by a single judge on 23 August 2011. The lawyer stated that in the session for review of the request of the Ministry of Justice to return the children, both the mother and the prosecutor were not given the opportunity to participate and that, therefore, the decision [of the District Court] constituted a violation of the contentious procedure.

46. However, the Supreme Court, by Decision PPC.no. 33/2011 rejected as unfounded the Applicant's request for repetition of the procedure before the District Court in Prizren (I.Agj.no.2/2009-16 dated 19 January 2010). The Supreme Court held that there were no new facts or evidence to allow the repetition of the procedure. Furthermore, the Supreme Court held that *"It is not contentious the fact that the mother of the children [...] with residence in Austria where she initiated the procedure for returning the minor children, and in the procedure for deciding on the request of the Ministry of Justice for returning the children to their mother [...], the procedural parties are the Ministry of Justice and the respondent* [the Applicant's husband] *who participated in the procedure, thus this court finds that by not inviting her to participate in the session, the court of first instance did not act illegally. As regards the allegation mentioned in the proposal for repetition of the procedure, that the court of first instance had not invited the competent Public Prosecutor to participate, the Supreme Court finds that it is not obligatory that the prosecutor participates in the session where the respondent is heard, since no provision of UNMIK Regulation 2004/29 for protection against international abduction of children, or the Hague Convention for civil aspects*

of international child abduction [provides for this]. *[T]hus the Supreme Court finds that the non-participation of the prosecutor in this session does not constitute an essential violation of the proceedings in which the challenged decision was taken."*

47. The Supreme Court concluded that "*considering that in the proposal for* repetition *of the procedure no new facts and evidence which might have lead to a more favorable final decision, if those facts and evidence had been used in the previous procedure, have been presented [...], this court deems that there are no valid reasons for repetition of the procedure and that, therefore, the proposal to repeat the procedure* [before the District Court] *is ungrounded.*"

48. Thereupon, the Applicant filed an appeal against this decision with the Supreme Court.

49. On 8 December 2011, the Supreme Court, by Decision Ac. no. 95/2011, rejected the Applicant's complaint as unfounded, considering that the Supreme Court in its decision of 23 August 2011 *"[...] rightly rejected the request for repetition of procedure, because there was no new evidence nor facts based on which a different more favorable decision would have been issued in the previous procedure".*

Applicant's allegations

50. The Applicant alleges that the Decision of the District Court in Prizren (I. Agj. No. 2/2009 of 19 January 2010), the Decision of the Supreme Court (PPC. No. 33/2011 of 23 August 2011) and the Decision of the Supreme Court (Ac. no. 95/2011 of 8 December 2011) were taken in violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to fair trial) of ECHR, because neither the Applicant nor the Public Prosecutor had been summoned to participate in the proceedings. In particular, the Applicant alleges that *"By the decision of the District Court in Prizren I.A.Gj. no. 2/2009 -16 dated 19.01.2010 and from the minutes of the main hearing undoubtedly results that the Applicant and District Public Prosecutor in Prizren have not even been invited and have not even participated in the trial, although their participation was obligatory pursuant to provisions of Article 4.2 of UNMIK Regulation no. 2004/29 for Protection Against International Abduction of Children. This Regulation was based exclusively on Convention for Civil Aspects of International Abduction of Children dated 25.10.1980."*

51. The Applicant further alleges that *"By provision of Article 4.2 of the Regulation it is foreseen that District Public Prosecutor, where the child was found, is competent to undertake legal actions on behalf of applicant. But, neither [she] (in the capacity of supervisor and custodian of her children pursuant to Article 1, § 1, subparagraph c) of the Regulation) nor the District Public Prosecutor (Article 4, § 1, subparagraph 2 of the Regulation) was enabled participation at the main hearing pursuant to the Regulation and Article 31 of the Constitution*

of the Republic of Kosovo and Article 6, paragraph 1 of European Convention for Human Rights and Freedoms."

52. Furthermore, the Applicant, alleges, that pursuant to Article 4.2 of UNMIK Regulation 2004/29, *"The district court shall transmit the application to the district public prosecutor with jurisdiction over the territory where the child is discovered. The district public prosecutor shall be competent to act on an application on behalf of the applicant."*

Admissibility of the Referral

53. 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, the Law and the Rules of Procedure.

54. The Court needs to determine first whether the Applicant is an authorized party within the meaning of Article 113.7 of the Constitution, stating that *"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."* In this respect, the Referral was submitted with the Court by an individual. Therefore, the Applicant is an authorized party, entitled to refer this case to the Court under Article 113.7 of the Constitution.

55. In addition, the Supreme Court is considered as a last instance court to adjudicate the Applicant's case. As a result, the Court determines that the Applicant has exhausted all the legal remedies available to her under Kosovo law.

56. Furthermore, an Applicant, in accordance with Article 49 of the Law, must submit the Referral within 4 months after the final court decision. On 8 December 2011, the Supreme Court took the Decision Ac. no. 95/2011, whereas the Applicant received the Decision on 14 January 2012. The Applicant submitted the Referral to the Court on 11 May 2012. Therefore, the Applicant has met the necessary deadline for filing a referral to the Constitutional Court.

57. Finally, Article 48 of the Law establishes: *"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."* In this respect, the Court notes that the Applicant challenges the Supreme Court Decision, Ac. no. 95/2011, whereby, allegedly, her rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR have been violated. Therefore, the Applicant has also fulfilled that requirement.

58. Since the Applicant is an authorized party, has met the necessary deadlines to file a referral with the Court, has exhausted all the legal remedies, and

accurately clarified the allegedly violated rights and freedoms, including the decision subject to challenge, the Court determines that the Applicant has complied with all requirements of admissibility.

59. Since the Applicant has fulfilled the procedural requirements for admissibility, the Court needs now to examine the merits of the Applicant's complaint.

Constitutional Assessment of the Referral

60. The Court notes that the Applicant complains exclusively that her rights guaranteed by Article 31 [Right to a Fair Trial] of the Constitution and Article 6 [Right to a fair trial] ECHR have been violated by the District Court in Prizren, since the latter had not invited the Public Prosecutor in Prizren and herself to the court hearing of 19 January 2010 where the request of the Ministry of Justice of the Republic of Kosovo, based on the request of the Ministry of Justice of the Republic of Austria, to return her three minor children to their habitual place of residence in Austria, was rejected by Decision I.Agj.no. 2/2009-16.

61. The Applicant also complains that Decisions PPC.no. 33/2011, dated 23 August 2011, and A.c.no. 95/2011, dated 8 December 2011, of the Supreme Court of Kosovo, by which the proposal of her lawyer to repeat the proceedings before the District Court in Prizren in order for the Public Prosecutor and herself to participate in those proceedings, was rejected a first time by the Supreme Court and then on appeal.

62. In view of the Applicant's complaints, the Court will, therefore, ascertain whether the District Court in Prizren and the Supreme Court, by applying the provisions of UNMIK Regulation no. 2004/29 and the Hague Convention have secured to the Applicant the guarantees set forth in Article 31 of the Constitution and Article 6 ECHR.

63. In view thereof, the Court notes that, when rejecting the Applicant's proposal for repetition of the proceedings before the District Court, the Supreme Court held, in its decision of 23 August 2011, that it is not contentious that in the procedure for deciding on the request of the Ministry of Justice for returning the children to the Applicant, the procedural parties were the Ministry of Justice and the respondent (the Applicant's husband) who participated in the proceedings. In the Supreme Court's opinion, by not inviting the Applicant to participate in the proceedings, the District Court had not acted illegally.

64. Moreover, the Supreme Court also held that it was not obligatory that the Public Prosecutor would participate in the session where the respondent (the Applicant's husband) was heard, since no provision of UNMIK Regulation 2004/29 or the Hague Convention provided for this.

65. As to the Supreme Court's findings, the Court will not go into the question whether or not the Supreme Court was right in determining who were the

procedural parties in the proceedings before the District Court or whether the Public Prosecutor should have been invited to the proceedings before that court. As mentioned above, the Court will only consider whether, in the circumstances of the case, the Applicant's rights under 31 of the Constitution and Article 6 ECHR were infringed, since she was unable to participate herself in the return proceedings.

66. The Court notes that the return proceedings before the District Court in Prizren were initiated by a request of the Kosovo Ministry of Justice, pursuant to paragraph 3(d) of Section 3 [General proceedings] of UNMIK Regulation 2004/29, according to which the Ministry of Justice, upon the receipt of a "foreign application" pursuant to the Hague Convention, shall take all appropriate measures to secure the prompt return of the child [...], inter alia, by initiating the institution of judicial proceedings with a view to obtaining the return of the child [...]. The "foreign application" emanated from the Austrian Ministry of Justice acting as the Central Authority of the children's' habitual residence following a request from the Applicant for assistance in securing the return of the children by virtue of Article 8 of the Hague Convention.

67. In this connection, the Court notes that neither UNMIK Regulation 2004/29, nor the Hague Convention expressly provides that, in judicial proceedings regarding child abduction, both parents should be entitled to participate. Only Section 4(2) of UNMIK Regulation 2004/29 stipulates that "The District public prosecutor shall be competent to act on an application on behalf of the applicant."

68. Be that as it may, as it appears from the submissions, in particular, from the decision of the Supreme Court of 23 August 2011, the Public Prosecutor was not present in the proceedings where the husband was heard. Moreover, the Supreme Court also found that the non-participation of the prosecutor in the session did not constitute an essential violation of the proceedings in which the challenged decision was taken.

69. The Court, therefore, considers that it is inconceivable that, in the present case, the District Court in its findings of 19 January 2010, concluded, without having invited the Applicant to participate in the proceedings, that it was not bound to order the return of the children, pursuant to Article 13(b) of the Hague Convention, since there was a grave risk that their return would expose them to physical or psychological harm or otherwise place the children in an intolerable situation.

70. Although the Minutes of the District Court in Prizren show that the Protocol of the District Court in Ried im Innkreis, containing the request of the Applicant to return her children, was read out, the Minutes also mention that the Applicant's husband as well as his lawyer were present at the hearing, where the former stated that there was no question of child abduction and that the return to the Applicant in Austria would have serious consequences for the children, since they attended school and were good students, while the Applicant lived in Austria. The husband also stated that the children had created big emotional

bonds with him and that the decision of the District Court would have an impact on their psychological and emotional development.

71. In these circumstances, the Court observes that, by not having been present at the above court proceedings, the Applicant was unable to refute the statements of her husband and other interested parties and was deprived of the possibility to convince the District Court that the children should be returned to their place of habitual residence in Austria in accordance with the Hague Convention. In the Applicant's opinion, this situation constituted a violation of her right to a fair trial.

72. The Court emphasizes that, according to the ECtHR case law, one of the aspects of the right to fair trial is the principle of equality of arms, implying that each party must be afforded a reasonable opportunity to present his/her case under conditions which do not place him/her at a substantial disadvantage vis-à-vis his/her opponent (see, *inter alia, Dombo Beheer N.V. v. The Netherlands,* Application no. 14448/88, ECtHR Judgment of 27 October 1993).

73. As to the present case, the Court is of the view that the presence of her husband and his lawyer at the proceedings before the District Court in Prizren placed the Applicant in a substantial disadvantage vis-à-vis her husband, since she was unable to present arguments and evidence and challenge the submissions of her husband during the course of the proceedings (see, *inter alia,* Case KI 103/10, Shaban Mustafa – Constitutional Review of the Judgment of the Supreme Court, Rev. no. 406/2008 of 3 September 2010, Judgment of 20 March 2012 and Case KI 108/10, Fadil Selmanaj – Constitutional Review of Judgment of the Supreme Court, A. no. 170/2009 of 25 September 2009).

74. As a consequence, the Supreme Court should have allowed the Applicant's lawyer's request for repetition of the proceedings before the District Court in Prizren instead of rejecting the request by decision of 23 August 2011 and the Applicant's appeal against that decision on 8 December 2011.

75. In these circumstances, the Court finds that the Applicant's rights to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6 (1) ECHR have been violated.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (1) of the Constitution, Article 20 of the Law on Court and Rule 56 of the Rules of Procedure, on 5 July 2013, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a breach of Article 31 [Right to a Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 [Right to Fair Trial] ECHR;

III. TO DECLARE invalid the decisions of the Supreme Court of Kosovo PPC. no. 33/2011, dated 23 August 2011 and Ac. no. 95/2011, dated 8 December 2011;

IV. TO ORDER the District Court in Prizren to repeat the proceedings of 9 and 13 July 2009 and to invite the Applicant to participate in these proceedings;

V. TO REMAIN seized of the matter pending compliance with that order;

VI. TO ORDER this Judgment to be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VII. TO DECLARE that this Judgment effective is immediately.

Judge Rapporteur | **President of the Constitutional Court**

Ivan Čukalović | Prof. Dr. Enver Hasani