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

Pristina, 5 July 2013
Ref.No.:MK460/13

Case No. KI52/12

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

Concurring Opinion of Judge Almiro Rodrigues

Introduction

1. I welcome the Constitutional Court Judgment, declaring 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, and ordering 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.

2. However, I respectfully disagree with the reasoning the Court utilized. Here below, I will state specifically the reasons why I do not agree with the reasoning in the opinion of the Court.

3. In fact, two intertwined decisions of the Supreme Court are under review: Decision Mlc. no. 2/2010 of 10 June 2010, confirming the Decision I. Agj. no. 2/2009/16 of the District Court of Prizren, dated of 19 January 2010; and Decision Ac. no. 95/2011 dated of 8 December 2011, rejecting as unfounded the Applicant's request for repetition of the procedure in the case I.Agj.no.2/2009/16 of the District Court of Prizren, dated of 19 January 2010. In sum, these two Decisions of the Supreme Court were taken in relation to the same and unique Decision I. Agj. no. 2/2009/16 of the District Court of Prizren, dated 19 January 2010, and one decision cannot be seen without the other, as they are logically interdependent.

4. In fact, the order of the Constitutional Court to 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, is not in accordance with the legal consequence of declaring invalid the decisions of the Supreme Court of Kosovo PPC.no.33/2011, dated 23 August 2011, and A.c.no. 95/2011, dated 8 December 2011.

5. In addition, Rule 74 (1) of the Rules of Procedure of the Court establishes that

> *In the case of a Referral made pursuant to Article 113.7 of the Constitution if the Court determines that a court has issued a decision in violation of the Constitution, it shall declare such decision invalid and remand the decision to the issuing court for reconsideration in conformity with the Judgment of the Court.*

6. In my view, the Court went beyond its jurisdiction when concluding with the order to the District Court *"to repeat the proceedings of 9 and 13 July 2009 and to invite the Applicant to participate in these proceedings"*. The Constitutional Court should have confined itself to *"declare such decision invalid and remand the decision to the issuing court* [the Supreme Court] *for reconsideration in conformity with the Judgment of the* [Constitutional] *Court"*. It is up to the Supreme Court to reconsider its Judgment in conformity with the Judgment of the Constitutional Court.

7. It is true that, in accordance with the principles of fair trial, a decision-making body only qualifies as a "tribunal" if, before giving its decision, it affords each of the parties an opportunity to present their point of view.

8. However, in the interest of procedural efficiency, particularly in those cases which require a speedy decision, summary procedures exist which are initially unilateral: for instance, provisional or protective measures or, as in the present case, urgent execution of a request.

9. In such cases, the judge decides either on the basis of the allegations made by the plaintiff alone or by the prosecuting authorities, insofar as these allegations

have at least a *fumus boni iuris* and are suitably convincing, or on the basis of a judicial decision immediately executable. In this case, the decision is merely provisional and the interested party can start appropriate proceedings in the competent court in order to have it set aside; but, in that event, the proceedings become adversarial. This is wholly in keeping with the requirements of Article 6 (1) of the ECHR.

10. The purpose of my concurring opinion is to examine those two decisions of the Supreme Court, in order to distill the legal consequences.

11. I am aware of that to arrive at the field of constitutionality, which is the core jurisdiction of the Constitutional Court, I will cross sometimes the domain of legality. However, that occurs only for the purpose of better explaining my view on the substantive constitutional aspects of the case.

12. In this respect, I will state the summary of the pertinent and relevant facts in relation to each of the decisions, indicate the applicable law, assess these facts in the light of the applicable law and draw a conclusion.

The Decision of the Supreme Court Mlc. no. 2/2010 of 10 June 2010

13. The Supreme Court, by that Decision Mlc. no. 2/2010, rejected the request for protection of legality filed by the Public Prosecutor, and confirmed the decision I. Agj. no. 2/2009/16 of the District Court of Prizren, dated 19 January 2010, by which it was concluded that *"the court is not obligated to order the return of child"*.

Summary of the pertinent and relevant facts

14. The Applicant Adije Iliri lived together with her husband and three children in Austria at Fischerstrasse 5/11, 4910 Ried in Innkreis, until, following a trip to Kosovo, she returned to Austria without her children and husband, who remained together in Kosovo.

15. After February 2009, the Applicant was in fact denied access to her children by her husband, and was unable to exercise her parental obligations because her husband had kept the children with him to live in Kosovo.

16. On 21 April 2009, the Applicant filed with the District Court in Austria a Request for the Return of the Children to their habitual residence. Following that request, the District Court in Austria started appropriate proceedings in order to guarantee the return of the children.

17. Subsequently, on 25 May 2009, the Austrian Federal Ministry of Justice, as the Austrian central authority according to the Hague Convention of 25 October 1980 on the civil aspects of international child abduction (hereinafter, the Convention on Abduction), filed a request (No. MBJ-C935-233/0001-I 10-2009) with the Ministry of Justice of the Republic of Kosovo for the return of the Applicant's three minor children to their habitual residence.

18. On 26 June 2009, the Ministry of Justice of the Republic of Kosovo, upon the request of the Federal Ministry of Justice of the Republic of Austria, filed a request with the District Court in Prizren asking it to issue an order securing the return of the children to their habitual residence in Austria.

19. On 2 July 2009, the District Court notified the District Public Prosecutor of the request of the Ministry of Justice of the Republic of Kosovo and asked the District Public Prosecutor *"to act on the application on behalf of the applicant"*, pursuant to Article 4 (2) of UNMIK Regulation No. 2004/29 on Protection Against International Abduction of Children (hereinafter, the UNMIK Regulation).

20. On 19 January 2010, the District Court [I.Agj.no.2/2009-16] rejected the request, stating that

> *"The case in question according to the District Court evaluation regardless the provisions of the Article* [Article 3 of Convention for civil aspects of international abduction of child] *in question the court is not obligated to order the return of child pursuant to Article 13 item (b) when it exist 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".*

21. On 10 June 2010, the Supreme Court rejected as ungrounded the request for protection of legality filed by the Public Prosecutor and confirmed the decision of the District Court in Prizren, considering that *"the District Court in Prizren was not obligated to order the return of these children".*

Applicable Law

22. Article 22 of the Constitution establishes that

> *Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:*
>
> *(...)*
>
> *(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;*
>
> *(...)*
>
> *(7) Convention on the Rights of the Child.*

23. Article 50 of the Constitution establishes that

> *1. Children enjoy the right to protection and care necessary for their wellbeing.*

2. Children born out of wedlock have equal rights to those born in marriage.

3. Every child enjoys the right to be protected from violence, maltreatment and exploitation.

4. All actions undertaken by public or private authorities concerning children shall be in the best interest of the children.

5. Every child enjoys the right to regular personal relations and direct contact with parents, unless a competent institution determines that this is in contradiction with the best interest of the child.

24. Article 53 of the Constitution establishes that

Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.

25. UNMIK Regulation took into account *"the principles and objectives of the Convention on the Civil Aspects of International Child Abduction of 25 October 1980"* and recognized *"the need to protect children from the harmful effects of their wrongful removal or retention and to establish procedures to ensure the prompt return of children wrongfully removed or retained and to ensure that rights of custody and of access are effectively respected"* (Introduction, paragraph 3 and 4).

26. Furthermore, for the purposes of the UNMIK Regulation, *"Convention" means the Convention on the Civil Aspects of International Child Abduction of 25 October 1980"*. In addition, Section 1 a) states that *"all actions pursuant to the present Regulation in relation to an application shall be undertaken in accordance with the Convention"*.

27. On the other side, the UNMIK Regulation is applicable under Article 145 of the Constitution which establishes that

(...)

2. Legislation applicable on the date of the entry into force of this Constitution shall continue to apply to the extent it is in conformity with this Constitution until repealed, superseded or amended in accordance with this Constitution.

28. In addition, the Convention on Abduction aims

"to secure the prompt return of children wrongfully removed to or retained in any Contracting State" (Article1, item a).

29. The Convention on Abduction also envisages removing a parent's incentive to abduct a child to a more favorable jurisdiction and preventing the consequences of wrongfully uprooting children from their homes.

30. For that purpose, Article 7 (f) of the Convention on Abduction provides that

"the Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children".

31. Particularly, the Central Authorities are obliged to take all appropriate measures in order

"to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtain the return of the child".

Assessment

32. As said above, the Supreme Court concluded that

"It is not contentious the fact that the mother of the children [...] with residence in Austria [...] *initiated the procedure for returning the minor children [...].*

33. Thus, it is indisputable that the subject matter under discussion before the Supreme Court should be *"the procedure for returning the minor children"* to their habitual residence.

34. However, the Supreme Court confirmed the decision of the District Court that held that *"the court is not obligated to order the return of child pursuant to Article 13 item (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".*

35. The adoption and confirmation of that conclusion is against the right of the children to return to their habitual residence and renders the Convention on Abduction ineffective in accomplishing that main objective.

36. The Constitutional Court has already confirmed that consideration when it similarly held that *"Kosovo regular courts are not competent to assess the merits of that decision [of a foreign court]; they are only competent for the execution of the decision of the [foreign court], pursuant to Article 3 (1.1) of the Convention on the Civil Aspects of International Child Abduction".* (See Decision of 10 December 2012, in Case No. KI 126/12, Constitutional Review of the Supreme Court Judgment, Mlc. no. 21/2012, dated 8 November 2012).

37. The Decision I. Agj. no. 2/2009/16 of the District Court of Prizren, which was confirmed by the Supreme Court, infringed the Convention on Abduction when, invoking Article 13 item (b) of the same Convention, simply concluded that *"the District Court in Prizren was not obligated to order the return of these children".*

38. As a matter of fact, the main intent of the Convention on Abduction is to cause the return of a child to his or her "habitual residence". If extraordinary circumstances exist, which suggest that return is exceptionally not appropriate, then other procedural requirements must be taken into account, as established

by the coordinated legal provisions of the UNMIK Regulation and the Convention on Abduction.

39. The European Court of Human Rights (hereinafter, the ECtHR) concluded that *"a change in the relevant facts might exceptionally justify not enforcing a final return order, but had to be satisfied that this change had not been brought about by the State's failure to take all reasonable measures. (...) The Court found that the [foreign] authorities had failed to take promptly all measures that could reasonably have been expected of them to enforce the return order (...).* (See case Sylvester v. Austria, Applications nos. 36812/97 and 40104/98, 24 April 2003).

40. Moreover, the efficient and effective application of the Convention on Abduction requires that the State's authorities be convinced that the State of the habitual residence of the child is in principle best placed to decide upon questions of custody and access, which are not the subject matter of the proceedings on ordering the return of the children.

41. In this respect, the ECtHR also found that the State *"should have taken or caused to be taken all provisional measures, including extra-judicial ones, which could have helped prevent "further harm to the child or prejudice to the interested parties". However, the authorities did not take any such measure but limited themselves to representing the applicant before the [requested foreign] courts. The Court considers therefore that the authorities failed to observe their full obligations under Article 7 of the Hague Convention".* (See case of Monory v. Hungary & Romania, Application no. 71099/01, 5 April 2005).

42. Furthermore, the procedural right of the child to the prompt return to the habitual residence aims to ensure effectively the rights of the child, as established by the Convention on the Rights of the Child, to be protected from family violence, to know and be cared for by his or her parents, not be separated from his or her parents against their will and to maintain personal relations and direct contact with both parents on a regular basis.

43. The UNMIK Regulation and the Convention on Abduction establish the competent court to execute the order on securing the prompt return of children. Section 4.1 of the UNMIK Regulation foresees that

> *"the district court which has jurisdiction over the territory where the child is discovered shall be competent to review an application, to issue decisions and orders relating to such application and to execute such decisions and orders".*

44. Thus, the District Court of Prizren is the *tribunal established by law* to order the prompt return of children to the habitual residence. "Established by law" also means "established in accordance with law". Therefore, the requirement established by Article 6 of the ECHR is infringed if a tribunal does not function in accordance with the particular rules that govern it. (See *Zand v. Austria* No 7360/76, 15 DR 70 at 80 (1978) Com Rep).

Conclusion

45. In these circumstances, the Supreme Court Decision Mlc. no. 2/2010 of 10 June 2010, confirming the Decision I. Agj. no. 2/2009/16 of the District Court of Prizren, dated of 19 January 2010, by not having ordered the immediate return, violated the rights of the children to the prompt return to the habitual residence, as guaranteed by the Constitution of Kosovo, the UNMIK Regulation and the Convention on Abduction, and the right to a competent court established by law, and in accordance with the law, to order the prompt return to their habitual residence.

The Decision Ac. no. 95/2011 dated of 8 December 2011, rejecting as unfounded the Applicant's request for repetition of the procedure

46. The Supreme Court, by that Decision Ac. no. 95/2011, *"rejected as ungrounded the appeal of the legal representative of children – mother Adije Iliri, with residency in Austria - filed against the decision of Supreme Court of Kosovo PPC.no.33/11 dated 23.08.2011"*. On the other hand, the Decision PPC.no.33/11 taken by the Supreme Court had rejected *as ungrounded the proposal of the legal representative of the children – mother Adije Iliri, with residency in Austria - for repetition of the procedure terminated by the decision of the District Court in Prizren I.Agj.no.2/2009 -16 dated 19.01.2010.* That Decision of the District Court of Prizren had concluded that *"the court is not obligated to order the return of child"*.

47. Both the Supreme Court final Decisions Mlc. no. 2/2010 of 10 June 2010 and Decision Ac. no. 95/2011 of 8 December 2011 were enacted in relation to the same decision of District Court in Prizren I.Agj.no.2/2009/16, dated 19.01.2010, and on the same subject matter of ordering the return of child.

48. Furthermore, it must be noted that the Supreme Court in both the Decisions acknowledged that the Applicant, *"mother Adije Iliri, with residency in Austria"*, was not acting on her own behalf, but rather as *"legal representative of the children"*.

Summary of the pertinent and relevant facts

49. On 19 January 2010, the District Court (Decision I. Agj. no. 2/2009/16) rejected the request of the Ministry of Justice of Kosovo, reasoning that *"the fact that the children since the divorce are under the care of their father [...] and that the same have created a strong emotional bond with their father and that the same attend the school in Kosovo, in concrete case there is a serious risk that the return of children will have a negative impact on psychological and physical development of children"*.

50. On 10 June 2010, the Supreme Court (Decision Mlc. no. 2/2010), rejected the request for protection of legality, and confirmed that reasoning and decision of the District Court in Prizren.

51. On 23 August 2011, the Supreme Court (Decision PPC. No. 33/2011), decided that

"from the side of the court of first instance was not invited to participate the competent Public Prosecutor" and

"to the detriment [of the Applicant] *by not inviting her to participate in the session, the court of first instance did not make illegal action".*

52. On 8 December 2011, the Supreme Court (Decision Ac. no. 95/2011) rejecting as unfounded the Applicant's complaint, held that it's Decision PPC. No. 33/2011, of 23 August 2011, *"[...] rightly rejected the request for repetition of the procedure because there was no new evidence or facts based on which a different more favorable decision would have been issued in the previous procedure".*

53. On 7 August 2012, the District Court in Prizren informed the Constitutional Court that *"the invitation for participation in the session dated 13.07.2009, was not sent to Ms. Adije Iliri".*

54. In conclusion, it is not disputable that the Public Prosecutor and the Applicant were not present in the proceedings in which the District Court took the Decision I. Agj. no. 2/2009/16, of 19 January 2010, which decision was confirmed by the challenged Decision Ac. no. 95/2011, of 8 December 2011, of the Supreme Court.

Applicable Law

55. Article 31 of the Constitution establishes that

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

56. Article 54 of the Constitution also establishes that

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

57. Article 9 of the Convention on the Rights of the Child establishes that

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine (...) that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as (...) one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

58. Article 13 (3) of the Convention on Abduction, 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".

59. Section 1 (b) of the UNMIK Regulation defines that

"Application" means an application pursuant to the Convention for assistance in securing the return of a child alleged to have been wrongfully removed or retained, within the meaning of Article 3 of the Convention, or to make arrangements for organizing or securing the effective exercise of the rights of access pursuant to the Convention.

60. Section 4 (1 and 2) of the UNMIK Regulation also provides that

The district court which has jurisdiction over the territory where the child is discovered shall be competent to review an application, to issue decisions and orders relating to such application and to execute such decisions and orders.

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.

61. In addition, Section 5 (2) of the UNMIK Regulation also foresees that

Judicial proceedings shall be conducted in accordance with the applicable Law on Non-Contested Procedure unless otherwise provided by the present Regulation or the Convention.

62. Finally, Section 8 of the UNMIK Regulation foresees that

The present Regulation shall supersede any provision in the applicable law that is inconsistent with it.

63. Article 6 (1) of the European Convention states that

In the determination of his civil rights and obligations (...), everyone is entitled to a fair (...) hearing within a reasonable time by an independent and impartial tribunal established by law.

Assessment

64. It must be recalled that the subject matter under adjudication in the proceedings is *"the procedure for returning the minor children"*, meaning the execution of the request of the Austrian authorities. However, the subject matter inappropriately turned into deciding on the merits of custody and access of children.

65. In fact, the District Court rejected the order to return the children to their habitual residence, because *"in the concrete case there is a serious risk that the return of the children will have a negative impact on the psychological and physical development of the children"*. The Supreme Court confirmed that reasoning and decision. Furthermore, the Supreme Court established that the competent Public Prosecutor was not invited to participate and the court of first instance did not make an illegal action by not inviting the Applicant to participate in the session.

66. In that case, the procedural right to a fair trial of the Applicant, as the *"legal* representative *of children"*, aims to ensure the rights of the children to return to their habitual residence, as established by the Austrian authorities. The Applicant is acting on behalf of the children, in accordance with her parental obligations.

67. The Applicant claims that the Supreme Court Decision Ac. no. 95/2011, dated 8 December 2011, rejecting as unfounded the Applicant's request for repetition of the procedure was taken in violation of Article 31 of the Constitution and Article 6 of the ECHR.

68. Furthermore, the Applicant alleges that neither the Applicant (as overseer and custodian of her children) nor the Public Prosecutor (as competent to act on an application on behalf of the Applicant) has been summoned to participate, and she did not, in fact, participate in the proceedings.

69. The Applicant concludes that she has not received a "fair hearing", within the meaning of Article 31 of the Constitution and Article 6 (1) of the European Convention.

70. The Supreme Court acknowledged all the above summarized facts.

71. On the other hand, pursuant to Section 4 (2) of the UNMIK Regulation,

> *"the public prosecutor shall be competent to act on an application on behalf of the applicant"*.

72. However, since the proceedings on return became proceedings on the merits of custody of the children, the Applicant became a party in her own right, and her participation became obligatory throughout the proceedings.

73. Nevertheless, the Supreme Court confirmed the finding of the District Court and concluded that *"by not inviting her to participate in the session, the court of first instance did not make an illegal action"*.

74. Thus, the challenged decision violated the right of the Applicant as guaranteed by Article 31 of the Constitution and Article 6 (1) of the European Convention.

75. The right to a fair trial is a general reference to a complex of other rights and principles, including the equality of arms. The notion of "equality of arms", as mentioned in the Judgment, implies that everyone who is a party to the proceedings shall have a reasonable opportunity of presenting her case to the Court under conditions which do not place her at substantial disadvantage *vis-à-vis* her opponent.

76. That conclusion is confirmed by the ECtHR that, in similar cases, considered that Article 6 does not always require a right to a public hearing and to be present irrespective of the nature of the issues to be decided. (*See, among other authorities*, Fejde v. Sweden, application 12631/87, Judgment of 29 October 1991). The subject matter of the proceedings before the District Court of Prizren is the execution of the order to return the children to the habitual residence requested by the Austrian authority. The mere execution of the order on return does not require the presence of the Applicant.

77. However, account must be taken of the entirety of the proceedings in the domestic legal order and to the manner in which the applicant's interests were actually presented and protected before the District Court of Prizren and the Supreme Court, particularly in the light of the nature of the issues to be decided by it. (*See among other authorities*, Helmers v. Sweden, application no. 11826/85, Judgment of 29 October 1991). The issue which was, in substance, decided by the District Court of Prizren was custody of the children. Then the parental rights of the Applicant became central. Therefore, the Applicant has the right to be present and have the opportunity of presenting her case to the Court under conditions which do not place her at substantial disadvantage.

78. Thus, the significance of this right is that the principle of the court hearing her case not only serves the purposes of clarifying the factual basis of the decision, but also ensures the respect of human rights in such a situation, in which the Applicant must be given the opportunity to assert herself with factual and legal arguments.

79. The ECtHR considered that "a litigant should be summoned to a court hearing in such a way as not only to have knowledge of the date and the place of the hearing, but also to have enough time to prepare his case and to attend the court hearing". (*See mutatis mutandis* Gusak v. Russia, 7 June 2011, Application no. 28956/05, para 27).

Conclusion

80. In these circumstances, the Applicant was not given the opportunity to present her arguments, to submit petitions before the regular courts and to present her views on the facts before the decision was made.

81. Consequently, her right to a fair and impartial trial by a tribunal established by law, as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [The right to a fair trial] ECHR was violated.

General Conclusion

82. In sum, the violation of the principle of equality of arms is a consequence of the first original violation of the right to a tribunal established by law committed by the courts not having ordered the return of the children.

83. For all these reasons, the Constitutional Court, with the reserve made above, should have ordered to the District Court in Prizren to execute the request of the Austrian authority on returning the children to their habitual residence.

84. In all, it is up to the Supreme Court to reconsider its Judgments in conformity with the Judgment of the Constitutional Court.

Almiro Rodrigues
Judge