



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE

УСТАВНИ СУД

CONSTITUTIONAL COURT

Prishtina, 21 February 2017

Ref. No.:VMP1043/17

## DECISION ON INTERIM MEASURES

in

**Case No. KO12/17**

Applicant

**The Ombudsperson**

**Constitutional review of the  
Articles 55 (paragraphs 4 and 5), 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66,  
67, and 68 of Law No. 05/L-087 on Minor Offences**

### THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President  
Ivan Čukalović, Deputy President  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge  
Bekim Sejdiu, Judge  
Selvete Gërxhaliu-Krasniqi, Judge and  
Gresa Caka-Nimani, Judge.

#### **Applicant**

1. The Referral was submitted by the Ombudsperson Institution of the Republic of Kosovo (hereinafter: the Applicant).

## **Challenged law**

2. The Applicant challenges the constitutionality of certain provisions of Law No. 05/L-087 on Minor Offences (the challenged Law), which entered into force in January 2017, namely Articles 55 (paragraphs 4 and 5), 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68.

## **Subject matter**

3. The subject matter of the Referral is the assessment of the constitutionality of the above referred to provisions of the challenged Law, which the Applicant alleges are not compatible with Article 31 [Right to a Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a Fair Trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).
4. The Applicant further requests the Court to impose interim measures suspending the implementation of Articles 55 (paragraphs 4 and 5), 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68 of the challenged Law until the final decision of the Court.

## **Legal basis**

5. The Referral is based on paragraph 2, subparagraph 1 of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution; Articles 22, 27, 29 and 30 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law); and, Rules 54, 55, 56, 62, and 64 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 10 February 2017, the Applicant submitted the Referral to the Court.
7. On 10 February 2017, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (presiding), Snezhana Botusharova and Ivan Čukalović.
8. On 14 February 2017, the Applicant was notified about the registration of the Referral.
9. On the same day, the Referral was communicated to: the President of the Republic of Kosovo; the President of the Assembly of the Republic of Kosovo with instructions to distribute the Referral to all Deputies of the Assembly; the Prime Minister of the Republic of Kosovo; the Secretariat of the Assembly of the Republic of Kosovo, which was asked to submit to the Court all documents relevant to the case; the Chair of the Kosovo Judicial Council; and the Ministry of Justice of the Republic of Kosovo with the instruction to submit to the Court any comments and documents relevant to the Referral.

10. The President of the Republic of Kosovo, the Deputies of the Assembly, the Prime Minister, the Chair of the Kosovo Judicial Council, and the Ministry of Justice, were asked to submit their comments, if any, by 3 March 2017.
11. On 15 February 2017, the Judge Rapporteur recommended to the Court the granting of the interim measure. On the same date, the Court decided unanimously to grant an interim measure until 30 April 2017.

### **Summary of facts**

12. On 05 August 2016, the Assembly of Kosovo adopted the challenged Law, with 71 (seventy one) votes in favor, 0 (zero) votes against and 0 (zero) abstentions.
13. On 23 August 2016, the challenged Law was promulgated by the President of the Republic of Kosovo.
14. On 08 September 2016, the challenged Law was published in the Official Gazette of the Republic of Kosovo.
15. As provided by Article 171 of the challenged Law, *“this law enters into force in January 2017”*.

### **Applicants’ allegations**

16. The Applicant challenges the provisions of the new Law on Minor Offences which “delegate adjudicatory competences to the executive branch”, specifically Articles 55 (paragraphs 4 and 5), 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68, claiming that they are not compatible with Article 31 [Right to a Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a Fair Trial) of the ECHR.
17. The Applicant maintains that *“persons accused of minor offences have the right to a fair trial before an independent tribunal, as guaranteed by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the European Convention on Human rights”*, and that in cases adjudicated by “Bodies on Minor Offence” (hereinafter: BMO), *“the Law on Minor Offences fails to provide the accused persons with access to an independent tribunal”*, while also arguing that *“the Administrative Matters Department of the basic Court of Pristina does not have full jurisdiction in reviewing the decisions of “bodies on minor offence”*. The Applicant summarizes its allegations against the challenged provisions of the new Law on Minor Offices raising the following question to the Court: *“Does this delegation of adjudicatory powers to administrative and executive bodies violate the right to a fair trial before an independent tribunal, as guaranteed by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the European Convention on Human Rights?”*.
18. The Applicant specifically alleges constitutional violations arguing that: a) *“persons accused of minor offences have the right to a fair trial before an independent tribunal”*; b) *“the Bodies of Minor Offence fail to meet the criteria*

on an independent tribunal“, and c) “the Administrative Department of the Basic Court of Pristina does not have full jurisdiction to review the decisions of the “Bodies on Minor Offence””.

***With regard to the right to a fair trial before an independent tribunal of the persons accused of minor offences***

19. The Applicant alleges that, “The Law No. 05/L-087 on Minor Offences delegates to administrative and executive bodies [the body on minor offence] the power to adjudicate and impose sanctions in a wide range of minor offence cases. The decisions of these bodies are subject only to a limited form of judicial review.”
20. In this regard, the Applicant also alleges that, “this delegation of adjudicatory powers [to the body on minor offence] violate the right to a fair trial before an independent tribunal, as guaranteed by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the European Convention on Human Rights”.
21. Further, the Applicant argues that, “a long line of ECtHR case law suggests that, even when minor offences are not classified as “criminal” within a domestic legal system, they nonetheless count as “criminal” in the context of the Convention, if the punishment of minor offences serves a deterrent and punitive purpose. This principle was demonstrated clearly in the case of *Öztürk v. Germany*, Application No. 8544179, ECtHR (1984).”
22. The Applicant in continuation specifies that, “In light of this expressly deterrent and punitive purpose of punishing minor offences in the Republic of Kosovo, such offences must be considered “criminal” under the meaning of Article 6, according to the ECtHR’s reasoning in *Öztürk*. Persons accused of minor offences in the Republic of Kosovo are therefore entitled to the protections of Article 6, including the right to a fair trial before an independent tribunal.”
23. The Applicant finally argues that, “In order to qualify as an “independent tribunal,” a body must satisfy a number of criteria. The two criteria most relevant to the assessment of the Law on Minor Offences are: (a) that the body be independent from the executive, and (b) that it have full jurisdiction. [...] Only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive..., merits the designation ‘tribunal’ within the meaning of Article 6 para. 1.”

***With regard to the Bodies of Minor Offence***

24. With regard to the BMOs, the Applicant mainly claims that: “the Law on Minor Offences fails to ensure the independence of BMOs from the executive branch on any of the ECtHR’s listed criteria. [...] the law itself stipulates that BMOs are administrative or executive bodies in charge of the implementation of laws. The BMO is defined as a “state administration body, or the body holding a public authorization ... to supervise the implementation of the law, which foresees minor offences” [...] Therefore, under the Law’s own definition,

*BMOs are not only not independent of the executive, but are themselves part of the executive."*

25. The Applicant also claims that the composition of the BMOs, as determined by the challenged Law, does not provide the necessary safeguards for its members' independence and impartiality.
26. Accordingly, the Applicant claims that BMOs *"cannot be considered to be 'independent' of the executive within the meaning of Article 6, para. 1 of the Convention"*.

***With regard to the Judicial Review by the Administrative Matters Department of the Basic Court of Prishtina***

27. The Applicant argues that, *"According to ECtHR precedent, an administrative body's lack of independence may be tolerated if the decisions of that body are 'subject to subsequent control by a judicial body that has full jurisdiction'."*
28. The Applicant claims that, *"The ECtHR's concept of 'full jurisdiction' is a strict one, and includes 'the power to quash in all respects, on questions of fact and law, the decision of the [administrative body]'" and "it is required that the 'tribunal' in question have jurisdiction to examine all questions of fact and law relevant to the dispute before it'."*
29. The Applicant further specifies that, *"The Administrative Matters Department's scope for reviewing BMO decisions is limited, especially when it comes to factual issues. The Law on Administrative Conflicts expressly stipulates that, in reviewing the decision of an administrative body, the Department 'shall decide on the administrative conflict issue, based on the facts ascertained in the administrative proceeding' – that is, based on the facts ascertained by the BMO."*
30. The Applicant finally argues that, *"the Law on Administrative Conflicts does give the [Administrative Matters] Department the possibility of overturning decisions of an administrative body on two limited factual grounds: (a) if "an inaccurate conclusion in the factual state viewpoint has been issued from the ascertained facts," or (b) if the facts 'at essential points were not fully ascertained' (id., Article 43, para. 2). In this way, the Administrative Matters Department may deny the conclusions that the BMO inferred from these ascertained facts, or decide that these facts were not fully ascertained. But what the Department may not do is examine other factual claims or evidence that had not already been examined in the BMO's own administrative proceedings. On this point, see Law on Minor Offences, Article 66, para. 1, subpara. 3 (complaints filed against BMO decisions 'cannot [state] new facts and propose new evidences'). Therefore, the Administrative Matters Department does not have the ability 'to examine all questions of fact and law relevant to the dispute before it'."*

## **Request for Interim Measure**

31. The Applicant requests the Court to impose an interim measure suspending the application of the challenged provisions of the challenged Law *“pending the final decision of this Court”*.
32. The Applicant alleges that, *“arguments adduced in this referral provide more than a prima facie case for the annulment of the contested provisions”*.
33. The Applicant also alleges that, *“in the absence of interim measures, there is a substantial risk that, by the time this Court reaches its final decision, the operation of “bodies on minor offence” will already have imposed punishments on accused persons without ever granting these persons access to an independent tribunal.”*
34. Finally, the Applicant alleges that, *“It is in the public interest for interim measures to be granted. As noted in Part I of the Argument, the Law on Minor Offences is a law of completely general application, covering “behavior by which there are violated or jeopardized the public order and peace as well as social values guaranteed by the Constitution of the Republic of Kosovo” (Law on Minor Offences, Article 2, para. 1). Given that the law covers such a wide swath of conduct, committed by both natural and legal persons (see id., Article 7, para. 4), it is in the public interest that this Court ensure, at least during the period in which its decision is pending, that accused persons not be subject to proceedings conducted by constitutionally questionable “bodies on minor offence”.*”

## **Assessment of the Request for Interim Measures**

35. In conducting an assessment of the request for interim measures, the Court examines whether the respective requirements established by the Constitution, and as further specified by the Law and foreseen by the Rules of Procedure have been met.
36. In this respect, the Court refers to paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, which 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.*

*(…)”*
37. In addition, the Court refers to Article 27 [Interim Measures] of the Law, which provides:

*“1. 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.*

*2. The duration of the interim measures shall be reasonable and proportionate.”*

38. Finally, the Court recalls Rule 55, paragraph 4 and 5 of the Rules of Procedure which specifies that:

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

[...]

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

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

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

[...]

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

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

39. The Court considers that the facts and allegations presented by the Applicant throughout the Referral raise a set of constitutional level questions which exhibit significant complexities and potential consequences in the administration of the justice system in the Republic of Kosovo. Accordingly, the Court considers that the Applicant has presented a prima facie case on the merits of the referral within the meaning of Rule 55, paragraph 4, under (a) of the Rules of Procedure.
40. Further, taking into account the importance of the right to a fair and impartial trial, as protected by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, for the effective protection of fundamental rights and freedoms in a democratic society, the Court concludes that the implementation of the Law No. 05/L-087 on Minor Offences of 8 October 2016, which entered into force in January 2017, more precisely the disputed Articles 55 (paragraphs 4 and 5), 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68, can potentially cause unrecoverable damage to the affected citizens of the Republic of Kosovo. Accordingly, the Court considers that the Applicant has shown the risk of unrecoverable damage within the meaning of Rule 55, paragraph 4, under (b) of the Rules of Procedure.

41. Finally, the Court considers that the questions raised in the Referral, are of such an importance for the protection of fundamental rights and freedoms guaranteed by the Constitution and for the proper administration of the justice system, that addressing them prior to the implementation of the challenged provisions of the challenged Law, is in the public interest. Accordingly, the Court considers that there are substantial reasons of a public interest nature within the meaning of Rule 55, paragraph 4, under (c) of the Rules of Procedure, to justify granting an interim measure.
42. Therefore, the Court, without prejudice to any further decision which will be rendered by the Court, on the admissibility or the merits of the Referral in the future, concludes that the request for interim measures must be granted in order to prevent unrecoverable damages and also to protect the public interest.

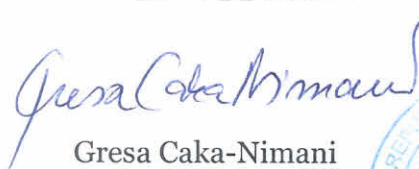
### **FOR THESE REASONS**

The Court, pursuant to Article 116(2) of the Constitution, Article 27 of the Law, and Rule 54 and 55 of the Rules of Procedure, on 15 February 2017, unanimously:

### **DECIDES**

- I. TO GRANT interim measures for a duration until 30 April 2017 from the date of the adoption of this Decision;
- II. TO IMMEDIATELY SUSPEND the implementation of the Articles 55 (paragraphs 4 and 5), 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68 of the Law on Minor Offences, throughout the same duration;
- III. This Decision shall be notified to the Parties;
- IV. This Decision shall be published in accordance with Article 20(4) of the Law; and
- V. This Decision is effective immediately.

**Judge Rapporteur**

  
Gresa Caka-Nimani

**President of the Constitutional Court**

  
Arta Rama-Hajrizi  
