

**Organization for Security and Co-operation in Europe  
MISSION IN KOSOVO**

**Use of Interim Measures  
in Civil Proceedings in Kosovo**

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## **EXECUTIVE SUMMARY**

This report examines the adjudication by courts in Kosovo, in the context of civil proceedings, of urgent applications for interim measures. The report concludes that, despite the clear legal requirements set forth in both the international human rights standards and the legal framework in Kosovo, courts frequently fail to consider applications for interim measures promptly or with due diligence, and in many cases fail to deal with these applications at all. The report notes that the imposition of interim measures may be necessary to ensure the effectiveness of the ultimate judgment on the merits of the claim. The report cautions that when courts fail to deal with such applications in a diligent manner and without delay, the execution of the ultimate judgment may be placed at substantial risk.

## **INTRODUCTION**

The imposition of interim measures is an important and powerful legal tool available to litigants in civil cases. The purpose of interim measures is to preserve the rights and interests of parties in cases before the courts, by preventing irreparable damage or loss from occurring before the court can make a final decision on the merits of the claim. Such measures are most often requested in cases involving property disputes or debt claims; however, they are also commonly requested in family law cases. Interim measures typically take the form of an injunction restraining a party from disposing of or otherwise dealing with his or her assets while judgment on the merits of the case is pending. They can also take the form of an order that specific assets be frozen, or alternatively, seized, pending the judgment, or that an amount of money be paid into court on an interim basis.

The legal framework in Kosovo provides for the imposition of such measures, upon the application of a party to the litigation. However, the Organization for Security and Cooperation in Europe Mission in Kosovo (OSCE) has observed that courts in Kosovo often fail to deal with applications for interim measures promptly or with the requisite diligence, and in all too many cases, courts are failing to deal with the applications at all. The OSCE is concerned that such failures violate the legal framework in Kosovo and may also violate international human rights standards. To this end, this report delineates the legal framework relevant to the adjudication of applications for interim measures, both internationally and domestically. The report then analyses a number of case examples monitored by the OSCE during the latter part of 2010. The report concludes with a number of specific recommendations to the courts, the Kosovo Judicial Institute and the Kosovo Judicial Council designed to address the problems identified in the analysis of the case examples.

## THE LEGAL FRAMEWORK

### A) International Human Rights Standards

Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) provides that, in the determination of his or her “civil rights and obligations, [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>1</sup>

Recent jurisprudence of the European Court of Human Rights (ECtHR) establishes that interim measures will normally fall within the rubric of “civil rights” for the purposes of Article 6(1).<sup>2</sup> The Court has noted that

“in circumstances where many Contracting States face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge's decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently, interim and main proceedings decide the same ‘civil rights or obligations’ and have the same resulting long lasting or permanent effects.”<sup>3</sup>

The ECtHR also noted that “[o]n the basis of the material available to the Court in respect of the legislation of a relevant number of Member States of the Council of Europe, it appears that there is widespread consensus on the applicability of Article 6 safeguards to interim measures”<sup>4</sup>

Where an application for interim measures arises in the context of family law litigation, it may also implicate Article 8 of the ECHR, which guarantees the right to respect for “private and family life”.<sup>5</sup> The ECtHR has observed that “because of its very nature and purpose, an application for interim custody measures must normally be treated with a certain degree of priority, unless there are specific reasons not to do so.”<sup>6</sup> “The Court considered that, in the circumstances, the authorities’ duty under Article 8 to secure respect for the right to private and family life of both applicants – parent and child – required the examination of the interim measures application with due diligence and without delay.”<sup>7</sup> The ECtHR concluded that the cumulative effects of the court’s

“failure to adopt interim custody measures without delay in a situation which affected adversely the applicants [...] amounted to a failure to assist the applicants contrary to

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<sup>1</sup> See Article 6(1), ECHR.

<sup>2</sup> See *Micallef v Malta*, ECtHR Judgment of 15 October 2009, paragraphs 31, 74-75, and 78-86.

<sup>3</sup> *Ibid*, paragraph 79.

<sup>4</sup> *Ibid*, paragraph 31. See also paragraph 85, wherein the ECtHR held that “[w]hen an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable.”

<sup>5</sup> See Article 8(1), ECHR. The ECtHR has held that “[w]hile the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective “respect” for private and family life and these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves.” See also *Bevacqua and S. v Bulgaria*, ECtHR Judgment of 12 June 2008, paragraph 64.

<sup>6</sup> See *Bevacqua and S. v Bulgaria*, ECtHR Judgment of 12 June 2008, paragraph 68.

<sup>7</sup> *Ibid*, paragraph 73.

the State positive obligations under Article 8 of the Convention to secure respect for their private and family life.”<sup>8</sup>

When an application for interim measures arises in the context of a property dispute, it may implicate Article 1 of Protocol 1 to the ECHR. This Article provides that

“[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”<sup>9</sup>

## **B) Legal Framework in Kosovo**

The law on contested procedure (LCP) contemplates the imposition of interim measures in the context of three distinct types of proceedings: those involving monetary claims, those involving claims for specified assets, and those arising out of non-monetary rights or interests.<sup>10</sup> Interim measures may be imposed when the applicant presents a credible argument that, if they are not imposed, the respondent may take steps making execution against his or her assets difficult or impossible.<sup>11</sup> Once such an argument has been presented, the court may “immediately [impose] the measures.”<sup>12</sup>

In proceedings involving a claim for money, the court may restrain the respondent<sup>13</sup> from alienating, hiding, encumbering or disposing of his or her assets, up to a value sufficient to satisfy the claim, pending a final determination on the merits.<sup>14</sup> Alternatively, the court may order the respondent to either deposit with the court, or pay directly to the applicant, an amount sufficient to satisfy the claim.<sup>15</sup> Where the respondent is a creditor to third parties, the court may order those third parties to either deposit their debt payments with the court or make payment directly to the applicant.<sup>16</sup> Where the respondent owns real property, the court may order the preregistration of a form of mortgage against the real property pending the final determination of the claim.<sup>17</sup>

In proceedings involving a claim for a specified asset, the court may restrain the respondent from alienating, hiding, encumbering or disposing of the asset pending a final determination of the claim on its merits.<sup>18</sup> Alternatively, the court may order the respondent to surrender the asset to the court, or to the applicant, on an interim basis for safekeeping.<sup>19</sup> The court may restrain the respondent from damaging the asset, and may order him or her to take steps to

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<sup>8</sup> Ibid, paragraph 84.

<sup>9</sup> Article 1, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 1), ETS 009, opened for signature 20 March 1952, as amended by the provisions of Protocol 11, ETS 155, entered into force 1 November 1998.

<sup>10</sup> Articles 299-301, Law No. 03/L-006 on Contested Procedure, published in Kosovo Official Gazette Year III/No. 38, 20 September 2008, (LCP).

<sup>11</sup> Article 297, LCP.

<sup>12</sup> Article 303, LCP.

<sup>13</sup> The terms ‘applicant’ and ‘respondent’ here refer, respectively, to the party making application for the interim measures and the party responding to the application.

<sup>14</sup> Article 299(1)(a), LCP.

<sup>15</sup> Article 299(1)(b), LCP.

<sup>16</sup> Article 299(1)(c), LCP.

<sup>17</sup> Article 299(1)(d), LCP.

<sup>18</sup> Article 300(1)(a), LCP.

<sup>19</sup> Article 300(1)(b), LCP.

protect the value of the asset.<sup>20</sup> In proceedings involving a claim arising out of a non-monetary right or interest, the court may restrain the respondent from performing specified activities that could damage the applicant's position.<sup>21</sup> Alternatively, the court may order the respondent to deposit a specified sum with a third party trustee pending final determination of the claim.

The court may impose interim measures before proceedings are commenced, as well as at any point during the proceedings, "until the execution is complete".<sup>22</sup> The application for interim measures shall be made in writing;<sup>23</sup> it shall set out the facts upon which the claim is based, and shall specify which interim measures are sought.<sup>24</sup> The application shall be served on the respondent, who shall have seven days to respond to it before any interim measures are imposed.<sup>25</sup> However, in cases where the applicant can demonstrate urgency, "temporary [interim] measures" may be imposed without the respondent being first served;<sup>26</sup> in such cases, a copy of the decision imposing the interim measures shall be immediately served on the respondent, who shall have three days to respond.<sup>27</sup>

## **USE OF INTERIM MEASURES IN CIVIL CASES IN KOSOVO**

Observations by the OSCE reveal that, in civil cases where interim measures are requested by one of the parties, courts frequently fail to adjudicate the requests at all. However, in cases where such requests are dealt with by the courts, they are all too often not processed diligently or in a timely manner, as required by the legislative framework.

In March 2009, the plaintiff filed a claim for custody of the child born of her "factual relationship" with the respondent. The facts alleged that, when the parties separated, the child, then less than one year old and still breastfeeding, had initially remained in the custody of the plaintiff; however, shortly after the separation, the respondent's family had taken the child from plaintiff's custody. The plaintiff alleged that the child was being cared for by the respondent's mother, who was elderly and in poor health, and consequently unable to care properly for the child. She argued that, as a result of the inadequate care he was receiving, the child had himself developed serious health problems, resulting in his hospitalisation. The plaintiff requested the imposition of interim measures, including the return of the child to her custody and an order requiring the respondent to pay alimony to her, pending final resolution of the claim. The first hearing in the case was not held until August 2009, some five months after the claim was filed. The court did not consider the plaintiff's application for interim

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<sup>20</sup> Article 300(1)(c), LCP. The court may also authorize the applicant to perform specified actions in relation to the asset: Article 300(1)(d)

<sup>21</sup> Article 301(1)(a), LCP. As is the case where the claim is for a specified asset, the court here may also authorize the applicant to perform specified actions: Article 301(1)(b).

<sup>22</sup> Article 304(1), LCP. Where interim measures are imposed prior to the commencement of proceedings, the applicant will be ordered to commence the proceedings within a specified timeframe "of no less than thirty (30) days": Article 308(1).

<sup>23</sup> Article 304(2), LCP. However, where the application is related to "ongoing court proceedings", it may be made orally during the court session.

<sup>24</sup> Article 304(3), LCP.

<sup>25</sup> Article 305, LCP.

<sup>26</sup> Article 306(1), LCP.

<sup>27</sup> Article 306(2), LCP. Once the three days have elapsed, a hearing shall be scheduled, at the conclusion of which the court shall either "annul" the decision imposing the temporary interim measures or replace it with a new decision imposing interim measures: Article 306(3).

measures at that hearing session, nor at four subsequent hearing sessions, in October and December 2009, and January and February 2010. At the hearing session in February 2010, the evidentiary portion of the proceedings concluded and closing arguments were made. At no point over the 11-month duration of the proceedings was the plaintiff's application for interim measures ever considered by the court.

The ECtHR has held that, because of their very nature and purpose, applications for interim [child] custody measures "must normally be treated with a certain degree of priority, unless there are specific reasons not to do so."<sup>28</sup> In the case above, the application involved interim custody arrangements for a very young child, apparently still breastfeeding and thus dependant on the applicant for basic nutrition. In addition, the application raised serious concerns about the quality of care the child was receiving and the implications for the child's health. Given the serious concerns raised, the application should have been considered by the court without delay. Failure to consider the application at an early date – indeed, to consider it at all – is a clear violation of both international human rights standards and the legal framework in Kosovo.

Most of the cases monitored by the OSCE involving applications for interim measures were property dispute cases. Such applications present a unique challenge to the courts in Kosovo, since property cases constitute the bulk of the backlog of civil cases, and as such often remain unresolved for long periods of time.<sup>29</sup>

The plaintiff and the respondent owned adjoining parcels of real property, and were in the course of litigating a dispute as to the true boundary between the two parcels of property. In September 2009, the plaintiff made an application for interim measures, asking the court to restrain the respondent from further interference with the plaintiff's use and possession of a garden plot which he claimed formed part of his property. The plaintiff argued that if such measures were not imposed, there was a danger that the respondent would take steps to alter the property in such a manner that the plaintiff's claim would be hindered. The case did not come before the court until October 2010. At the hearing session, the court ordered that the two claims be joined and heard together, but did not consider the plaintiff's application for interim measures.

In the above case example, the court failed, over the thirteen month period between the application for interim measures and the most recent hearing session in the case, to deal in any manner with the application. This failure to consider the application, either diligently or at all, clearly violates both international human rights standards and legal framework in Kosovo. Further, it puts the ultimate judgment in the case at risk of being hindered.

In 1996, a plaintiff commenced proceedings in a municipal court to transfer a piece of real property. The transfer was to be made pursuant to a previous court order. The proceedings remained inactive for eleven years until 2007, when a first hearing was scheduled in the case. A second hearing was scheduled for March, 2010. In 2008, shortly before the second hearing, however, it emerged that the plot of land at issue in the dispute had been fraudulently transferred by the respondent to a third party. In

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<sup>28</sup> *Bevacqua and S. v Bulgaria*, ECtHR Judgment of 12 June 2008, paragraph 68.

<sup>29</sup> See European Commission, *Kosovo 2010 Progress Report, SEC (2010) 1329, accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2010–2011, {COM (2010) 660}*, p. 18, Brussels, 9 November 2010.

June 2010, the plaintiff applied for interim measures. He sought, first, to restrain the legalization office of the municipal court from legalizing the fraudulent transfer, and second, to restrain the directorate of the cadastral records office from making any changes to the cadastral books with respect to the plot of land. The court did not respond to this application for interim measures at any point over the course of the next three hearing sessions. The proceedings are still ongoing.

As discussed earlier in this report, the ECtHR has held that applications for the imposition of interim measures must be considered by the courts “with due diligence and without delay.”<sup>30</sup> In the above case example, the fact that the piece of land at issue had been the subject of a fraudulent conveyance ought to have alerted the court to the particular urgency of this application. The failure of the court to deal with the application for interim measures in these circumstances is particularly egregious, and may well have the result of frustrating the ultimate judgment on the merits of the plaintiff’s claim.

In May 2010, the claimants commenced proceedings seeking confirmation of ownership of a piece of land. In June 2010, they applied to the court for an order restraining the respondents from constructing an apartment building on the land, pending a final judgement of the court on the issue of ownership. They alleged that the respondents had in fact already taken steps to obtain a permit for the construction of an apartment building. In early July 2010, the application for interim measures was served on the respondents. In late July, the respondents filed a response, in which they argued against the imposition of interim measures and asked the court to dismiss the claimants’ application. Hearing sessions were convened in September and October 2010 to deal with the application; however, due to summoning problems, these sessions were adjourned without the application ever being considered. As at the date of preparing this report, some five months after the application for interim measures it had still not been considered by the court.

It is noteworthy that in the above case example, the court made some attempt to deal with the application for interim measures. At least it was sent to the respondents for response. However, it is not clear why the court could not consider and decide on the application. If the court was of the view that there was not a sufficient basis to impose the measures sought, it could have simply dismissed the application. Instead, the application was not processed any further for a period of several months and may indeed still be in limbo. In the interim, the respondents might well have taken further steps toward the construction of the apartment building, thereby placing at risk the execution of the ultimate judgment in the case.

In June 2009, the claimants commenced proceedings in which they sought the repetition of a confirmation of ownership proceeding from which they had allegedly been unduly excluded. They alleged that the respondents had deceived the court as to their existence and/or whereabouts, and argued that they were entitled to a re-trial on that basis. They also requested the imposition of interim measures to restrain the respondents from alienating, encumbering or in any way altering “the structure of” the piece of agricultural land at the heart of the inheritance proceedings. The respondents argued that the court should not make any order for interim measures, particularly given that there was already a judgment in their favour. The case proceeded to a main hearing session in October 2010. The evidentiary phase of the

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<sup>30</sup> *Bevacqua and S. v Bulgaria*, ECtHR Judgment of 12 June 2008, paragraph 73.

proceedings took place, following which closing arguments were made. The parties are now awaiting further decision or judgment in the case.

The above case example presents a complex fact pattern, in that the inheritance at the heart of the claim had already been adjudicated by the court and a final judgment delivered. However, complexity is not a bar to adjudicating an application for interim measures. The application was before the court and the failure to consider it was a violation of both international human rights standards and the legal framework in Kosovo.

## **CONCLUSION AND RECOMMENDATIONS**

This report highlights serious shortcomings in the adjudication of applications for interim measures in the courts in Kosovo. In cases observed by OSCE such applications were dealt with neither promptly nor with due diligence. In all too many cases, the applications do not appear to have been considered by the courts at all. In some cases, it appears that the court involved was either unable or unwilling to separate the application for interim measures, on the one hand, from the claim on its merits, on the other, and to consider the former independently of the latter.

Courts in Kosovo have a positive obligation to deal with applications for interim measures, and to do so diligently and without delay. Because of their very nature and purpose, applications for interim measures should be viewed as urgent, and should be treated with a certain degree of urgency. The imposition of such measures may be necessary to ensure the effectiveness of the ultimate judgment on the merits of the claim. When courts fail to deal with such applications promptly and with due diligence, execution of the ultimate judgment may be placed at substantial risk. The imposition of interim measures will in many cases be the difference between being able to execute upon the judgment and not.

### **To the courts:**

- Ensure that applications for interim measures are dealt with promptly and with due diligence;
- Ensure that civil judges sitting on cases involving applications for interim measures are familiar with the provisions of the LCP regulating the adjudication of such applications;
- Develop and implement a comprehensive, proactive case management strategy for use in civil cases involving applications for interim measures; and,
- Make full use of preparatory proceedings to anticipate and deal with applications for interim measures.

### **To the Kosovo Judicial Institute:**

- Continue training civil judges on the legislation related to interim measures; and,
- Consider offering more extensive training to civil judges in proactive case management skills.

**To the Kosovo Judicial Council:**

- Continue training on the use of case management information systems; and,
- Consider offering specific training to court staff on the application of case management information systems to urgent matters such as applications for interim measures.