



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

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Prishtina, 16 December 2013  
Ref. no.: RK522/13

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI116/13**

Applicant

**Isni Thaçi**

**Request for constitutional review of the Judgment of the Supreme Court  
of Kosovo, PML. No. 91/2013, of 21 June 2013**

### **THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of

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

#### **Applicant**

1. The Applicant is Mr. Isni Thaçi from the village of Burojë, Municipality of Skenderaj. He is represented by the Law Firm "Sejdiu & Qerkini", with offices in Prishtina.

## **Challenged decision**

2. The challenged decision is the Judgment PML. No. 91/2013, of 21 June 2013, of the Supreme Court of Kosovo. This Judgment was served on the Applicant on the same day,

## **Subject matter**

3. The subject matter of the Referral is the assessment of the constitutionality of the Judgment of the Supreme Court by which the request for protection of legality was rejected and the Decision of the Appeals Court is upheld. This Judgment left in force the imposition of detention on the Applicant. The Applicant alleges that this decision has not been reasoned in a legal manner.

## **Legal basis**

4. Article 113.7 of the Constitution, Article 22 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter the Law), of 15 January 2009, and Rule 29 of the Rules of Procedure (hereinafter the Rules of Procedure) .

## **Proceedings before the Constitutional Court**

5. On 29 July 2013, the representative of the Applicant filed the Referral with the Court.
6. On 5 August 2013, , the President of the Court appointed Judge Snezhana Botusharova as the Judge Rapporteur and the Review Panel composed of judges: Robert Carolan (Presiding), Almiro Rodrigues and Enver Hasani
7. On 9 September 2013, the Constitutional Court notified the Applicant and the Supreme Court of the registration of the Referral.
8. On 22 October 2013, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral

## **Summary of the facts**

9. On 24 May 2013, the Applicant was arrested on suspicion of having committed in co-perpetration the criminal offence "war crimes against civilian population with multiple counts of charges".
10. On 24 May 2013, the pre-trial judge with Ruling GJPP no. 27/2012 rejected the request of the prosecutor of 24 May 2013 for imposing detention on remand and ORDERED "*security measure of HOUSE DETENTION against the accused Hysni Thaçi in duration of one (1) month, from 23 May 2013 until 23 June 2013.*"

11. The Special Prosecutor of the Republic of Kosovo filed an appeal with the Court of Appeal against this Ruling.
12. On 31 May 2013, the Court of Appeal issued Ruling KP/KV no. 766/2013, deciding upon the appeal of the Prosecutor, and modified the Ruling of the Basic Court in Mitrovica. The Court of Appeal imposed detention on remand against the accused for the duration of one month, instead of the measure of house detention.
13. The Ruling of the Court of the Appeal imposing detention on remand against the Applicant has not been attached to the Referral filed with the Constitutional Court by the Applicant.
14. On 4 June 2013, the representative of the Applicant filed a “request for protection of legality” with the Supreme Court of Kosovo against the Ruling KP/KV no. 766/2013, on the basis of violations of Article 103.2 of the Constitution, Article 187 of the Criminal Procedure Code ( No. 04/L-125) and Article 384.2 of the Criminal Procedure Code of Kosovo.
15. On 21 June 2013, the Supreme Court REJECTED the request for protection of legality and UPHELD the Ruling of the Court of the Appeal KP/KV No. 766/2013 of 31 May 2013.

### **Applicant’s allegations**

16. The Applicant alleges that Judgment No 91/2013 of the Supreme Court has violated Article 53 of the Constitution (Interpretation of Human Rights Provisions) and Article 5.1 and 5.3 of the European Convention on Human Rights “as a result of inadequate reasoning of the Judgment issued regarding the rejection of the request for protection of legality”.

### **Assessment of the admissibility of the Referral**

17. The Court first examines whether the party has met the admissibility requirements, laid down in the Constitution, the Law on the Constitutional Court and the Rules of Procedure .
18. Regarding this, the Court refers to Article 113.7 of the Constitution, which provides:
 

*“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”.*
19. In this regard, in assessing the formal requirements of admissibility, the Court finds that the Referral has been filed by an authorized party, within the time limits prescribed by Article 49 of the Law on the Constitutional Court and after the exhaustion of legal remedies available at this stage of criminal proceedings that is conducted against the Applicant, therefore the Referral is suitable for review by the Court.

20. The Court notes that the Applicant specifically challenges the Judgment PML. No 91/2013 of the Supreme Court of 21 June 2013, which rejected as unfounded the request for protection of legality and upheld the Ruling of the Court of Appeal KP/KV No. 766/2013, of 31 May 2013, on the basis of which the measure of detention on remand was imposed against the Applicant.
21. The Applicant expressly alleges that the Judgment of the Supreme Court has violated Article 53 of the Constitution and Article 5.1 and 5.3 of the European Convention on Human Rights.

**The content of the constitutional provision and of the challenged provisions of the European Convention on Human Rights**

22. a) the Constitution of the Republic of Kosovo

Article 53 [Interpretation of Human Rights Provisions]

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

- b) European Convention on the Human Rights

Article 5 .1– Right to liberty and security

*1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

- a. the lawful detention of a person after conviction by a competent court;*
- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;*
- c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
- d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
- e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
- f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition;*

[.....]

*5.3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*

23. In response to the allegations made by the Applicant of the violation of above quoted provisions, the Court emphasizes:

**The Constitution of the Republic of Kosovo provides that:**

Article 102 [General Principles of the Judicial System]

- 1. Judicial power in the Republic of Kosovo is exercised by the courts  
[.....]*
- 3. Courts shall adjudicate based on the Constitution and the law.*

Article 103 [Organization and Jurisdiction of Courts]

- 2. The Supreme Court of Kosovo is the highest judicial authority*

**Criminal Procedure Code of Kosovo provides that:**

Article 432 -Grounds for filing a request for protection of legality

- 1. A request for protection of legality against a final judicial decision or against judicial proceedings which preceded the rendering of that decision may, after the proceedings have been completed in a final form, be filed in the following instances:*

*1.1. on the ground of a violation of the criminal law;*

*1.2. on the ground of a substantial violation of the provisions of criminal procedure provided for in Article 384, paragraph 1, of the present Code; or*

*1.3. on the ground of another violation of the provisions of criminal procedure if such violation affected the lawfulness of a judicial decision.*

*2. A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon.*

*3. Notwithstanding the provisions under paragraph 1 of the present Article, the Chief State Prosecutor may file a request for protection of legality on the grounds of any violation of law.*



*4. Notwithstanding the provisions under paragraph 1 of the present Article, a request for protection of legality may be filed during criminal proceedings which have not been completed in a final form only against final decisions ordering or extending detention on remand.*

24. Article 435 of the Criminal Procedure Code of Kosovo (No. 04/L-123) in paragraph 1 has provided: *A request for protection of legality shall be considered by the Supreme Court of Kosovo in a session of the panel.*
25. Taking into consideration the allegations of constitutional violations as presented by the Applicant and based on the above quoted legal provisions the Constitutional Court concludes:

**As to the allegation of the violation of Article 53 of the Constitution:**

26. The interpretation of the constitutionally guaranteed human rights under the Constitution should always be done consistently with the decisions of the European Court of Human Rights (ECtHR) and this constitutional obligation concerns all institutions of the Republic of Kosovo when deciding on matters falling within their jurisdiction and concerning human rights.
27. The Applicant in his Referral has emphasized the violation of this constitutional provision but the Court notes that he did not present facts related to this violation. Emphasizing Article 53 without providing concrete facts as to the type of violation, possible extent of the violation, consequences caused by the violation, cannot, in itself, constitute a violation or diminishing of a right guaranteed under the Constitution or non-compliance with ECHR case law.
28. Furthermore, the Constitutional Court cannot find a violation of Article 53 of the Constitution when the Supreme Court issued its decision, which is the act that has been explicitly challenged by the Applicant, also due to the fact that the Applicant in his request for protection of legality never raised a violation of human rights as guaranteed under the Constitution.
29. The applicant based his request for protection of legality on a violation of Article 103.2 of the Constitution which establishes the legal basis for decision making of the courts in Kosovo and on a violation of provisions of the Criminal Procedure Code, which in fact are legality issues and not constitutional issues.
30. Nevertheless, the Court notes that if the proceedings are viewed in their entirety, the courts, and in particular the first instance court, to a considerable extent refer to the case law of the ECHR, (for example "Punzelt v Czech Republic", „Stogmuller v Austria", etc.) therefore under such circumstances it cannot be concluded that there has been a violation of Article 53 of the Constitution.

**As to Article 5.1 and 5.3 of ECHR**

31. Also for the alleged violations of Article 5.1 and 5.3 of the European Convention on Human Rights which pursuant to Article 22 of the Constitution of Kosovo is directly applicable in the Republic of Kosovo, the Applicant does not provide

facts with regard to the legal basis of the violation, incompatibility of the Judgment with the provisions of the Convention or convincing legal arguments for the arbitrariness of this Judgment.

32. The Applicant has emphasized that according to ECHR case law, decisions of the courts must be reasoned and they must address the issues raised by complainants and for this very reason he alleges that the Judgment of the Supreme Court has violated Applicant's human rights.
33. The Court on this occasion recalls that the request for protection of legality pursuant to the Criminal Procedure Code "*may not be filed on the ground of an erroneous or incomplete determination of the factual situation*" and whether the measure of arrest or detention on remand was imposed in accordance with the law it depends on the fulfillment of the conditions foreseen by the law and the complete and correct determination of the factual situation which is the duty of the regular courts.
34. However the Applicant has not challenged these two decisions before the Constitutional Court and furthermore he has not submitted together with his Referral the Ruling of the Court of Appeal by which detention on remand was ordered and wherein the reasons for this Ruling were given. On the other hand, the Supreme Court in its Judgment, concluded that the reasoning in the Ruling of the Court of Appeal was clear and entirely in accordance with the law.
35. By failing to attach the Ruling of the Court of Appeal, the Applicant has not sufficiently substantiated his allegation of a constitutional violation.
36. In the reasoning of its Judgment, the Supreme Court stated, *inter alia* : "*The Supreme Court finds that the challenged Ruling of the Court of Appeals in general provides sufficient explanations on all material facts. The Court of Appeals proved in detail the grounded suspicion against the accused when it explicitly referred to the findings of the Basic Court in relation to this matter. The Court of Appeals has also explained completely and in detail why the detention on remand is the only possible measure in the current situation.*"
37. *Therefore, the Supreme Court finds that all the conditions pursuant to Article 187 of the Procedure Code have been completely met by the Court of Appeals in its reasoning. Finally, the Supreme Court finds that the Ruling has been compiled in full accordance with Article 370 and that there are no procedural violations in the challenged Ruling against any other Article of the Criminal Procedure Code.*"
37. Furthermore, the Supreme Court added that: "*The law does not define the use of any ordinary legal remedy against the Rulings of the Court of Appeals. The Ruling is considered final, against which if it is related to the imposing of detention on remand, a request for the protection of the legality may be submitted pursuant to Article 432, paragraph 4 of the CPC. Therefore, the Supreme Court finds that there has been no procedural violation in relation to this issue.*"

38. In relation to all the allegations made by the Applicant with regard to the Judgment of the Supreme Court of Kosovo, the Court considers that: “the Constitutional Court is not a fact finding court and on this occasion it wishes to reiterate that the complete and correct determination of the factual situation is within the full jurisdiction of the regular courts. In the concrete case the factual circumstances were determined by the Court of Appeal in its ruling KP/KV No766/2013 of 31 May 2013 issued upon appeal filed by the Prosecutor in the case, and by the Supreme Court in its Judgment PML. No. 91/2013 of 21 June 2013. The role of the Constitutional Court is only to ensure compliance with the rights guaranteed by the Constitution and therefore it cannot act as “a fourth instance court”, (see, *mutatis mutandis*, i.a., Akdivar v. Turkey, 16 September 1996, R.J.D, 1996-IV, para. 65).
39. The Court further considers that in order to declare a Judgment or a Ruling by a public authority incompatible with Constitution, the Applicant should prove *prima facie* before the Constitutional Court that “*the decision of the public authority as such will be an indicator of the violation of the requirement for a fair trial, and the unreasonableness of that decision is so striking that the decision can be regarded as grossly arbitrary*” (see ECHR, Khamidov v. Russia, no. 72118/01, Judgment of 15 November 2007, § 175).
40. The Constitutional Court did not find elements of arbitrariness or of the alleged violation of human rights in the Judgment of the Supreme Court PML. No. 91/2013, of 21 June 2013, as alleged by the Applicant.
41. In these circumstances, the Applicant has not sufficiently substantiated his claim, consequently, the Court, pursuant to Rule 36 paragraph 2 item c and d, finds that it must reject the Referral as manifestly ill-founded and



## FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 7 of the Constitution, Article 48 of the Law on Court and Rule 36 (1.c) and Rule 56 (2) of the Rules of Procedure, on 16 December 2013 , unanimously

## DECIDES

- I. TO REJECT the Referral as Inadmissible
- II. TO NOTIFY the Parties of this Decision;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;
- IV. TO DECLARE this Decision effective immediately.

**Judge Rapporteur**



Snezhana Botusharova



**President of the Constitutional Court**



Prof. Dr. Enver Hasani