



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

Prishtina, 31 March 2014  
Ref. No.: RK 583/14

## **RESOLUTION ON INADMISSIBILITY**

**In case No. KI123/13**

Applicant

**Afrim Karaxha**

**Constitutional Review  
of the Judgment of the Supreme Court, Rev. Mlc. No. 93/2011,  
of 1 February 2013**

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

composed of:

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

#### **The Applicant**

1. The Referral is submitted by Mr. Afrim Karaxha (hereinafter: the Applicant), represented by Mr. Mahmut Halimi and Mr. Betim Shala, practicing lawyers from Prishtina.

## **Challenged decision**

2. The challenged Decision is the Judgment of the Supreme Court, Rev. Mlc. No. 93/2011 of 1 February 2013, which was served on the Applicant on 25 April 2013.

## **Subject matter**

3. The subject matter is the request for constitutional review of the Judgment of the Supreme Court, Rev. Mlc. No. 93/2011 of 1 February 2013. In its Judgment, in a case related to division of property acquired during the marriage relationship, the Supreme Court approved the request for protection of legality filed by the State Prosecutor and the request for revision filed by the Applicant's former spouse, whereby it amended the Judgment of the District Court in Prishtina and upheld the Judgment of the Municipal Court in Prishtina.

## **Legal basis**

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Proceedings before the Court**

5. On 14 August 2013, the Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 30 August 2013, based on Decision GJR.KI123/12 of the President, Judge Snezhana Botusharova was appointed as Judge Rapporteur. On the same date, by Decision KSH.KI123/12 of the President, the Review Panel was appointed, composed of Judges: Robert Carolan (presiding), Almiro Rodrigues and Enver Hasani.
7. On 23 September 2013, the Court informed the Applicant and the Supreme Court of the registration of the Referral. On the same date, the Court notified the Basic Court in Prishtina and requested the submission of the return receipt, which shows the date when the Judgment of the Supreme Court, Rev. Mlc. No. 93/2011 of 1 February 2013 was served on the Applicant.
8. On 2 October 2013, the Basic Court in Prishtina submitted to the Court the copy of the return receipt, which shows that the Judgment of the Supreme Court, Rev. Mlc. No. 93/2011 of 1 February 2013 was served on the Applicant on 25 April 2013.
9. On 20 January 2014, the Review Panel considered the report of Judge Rapporteur and made a recommendation to the full Court on the inadmissibility of the Referral.

## The facts of the case

10. The Applicant was married to his former spouse from 1978 until 2000.
11. On 5 November 1980, the Applicant concluded with his former spouse a contract of purchase of an Apartment in Prishtina. Based on the case files, the father of the Applicant contributed a certain amount for the purchase of that Apartment.
12. On 12 August 1982, the Applicant, his father and his former spouse concluded an agreement stipulating that, in case of dispute between the parties, the parties agree that the ownership of the Apartment will be divided based on the investment of each party. This agreement was certified by the Municipal Court in Prishtina (Decision No. 2709/12)
13. After the divorce, on 11 May 2000, the former spouse of the Applicant and their three children remained in their joint Apartment.
14. On 10 July 2000, the Applicant filed a claim with the Municipal Court in Prishtina, requesting the division of the property acquired during the marriage relationship and also requested the ownership over the Apartment for the part for which he and his father contributed to its purchase.
15. On 12 July 2005, the Municipal Court in Prishtina rendered Judgment C. No. 330/2000, whereby it partly rejected the Applicant's claim and approved in its entirety the counterclaim of his former spouse, confirming that the Applicant and the former spouse are co-owners, each for 1/2 part of the Apartment.
16. In the above-mentioned Judgment, the Municipal Court in Prishtina argued:

[...]

*"In this manner, the allegations of the claimant/counter-respondent that his contribution is larger, is assessed to be of no influence in the conviction of the court. This is due to the fact that it derives from the statements of litigating parties themselves, when heard as parties to the proceeding, and it can be clearly confirmed that both spouses have engaged as per circumstances of the case, and they had both similar income from work, and that the difference in income and earnings was not of such volume to represent any exploitation of one spouse by the other, and that the respondent, apart from her job in the enterprise, took care also of the claimant and the three children they had together, and for all the housework, which is additional duty, and which in the sense of Article 314 of the Law on Marriage and Family Relations is of influence in rendering the judgment on the extent of contribution of each spouse in gaining assets during marriage."*

[...]

*Hence, considering the fact that the contracting parties in the contract on purchase of apartment were both claimant Afrim and respondent [...], that the apartment was registered in their names in cadastral records, and the*

*circumstance that there was no third party claim against them, the Court finds that the case must be reviewed only as marital co-ownership. The allegations of the claimant, that he was helped by his father and brother, are considered to be of no influence in this case, since this was not done only for one of the spouses. Therefore, in accordance with legal rules, the assistance provided to a marital union is considered to have been provided to both spouses, unless explicitly provided otherwise.”*  
[...]

17. The Applicant submitted a complaint to the Judicial Inspection Unit of the Department of Justice (UNMIK) alleging improper behavior of the Judge of the Municipal Court assigned to the case and unnecessarily delay of proceedings.
18. Consequently, on 5 December 2005, the Director of the Department of Justice, responded to the complaint of the Applicant, stating that, based on the investigations carried out by the Judicial Inspection Unit, the Unit could not find convincing evidence which would support the allegations of the Applicant. Referring to the length of proceedings, it established that the Court held 15 sessions between 10 April 2001, the date when the Judge was assigned to the case, and 12 July 2005, the date when the Municipal Court in Prishtina rendered its Judgment. According to this Unit, the delays of the proceedings were due to the complexity of the case.
19. Against the Judgment of the Municipal Court (C. No. 330/2000 of 12 July 2005), the Applicant filed an appeal with the District Court in Prishtina.
20. On 12 December 2007, the District Court in Prishtina by Decision Ac. No. 953/2005 quashed the Judgment of the Municipal Court in Prishtina (C. No. 330/2000 of 12 July 2005) and remanded the case for retrial to the first instance court.
21. On 10 June 2008, the Municipal Court by Judgment C. No. 302/2007 approved the claim of the Applicant's former spouse and upheld that the Applicant and the former spouse are co-owners each for 1/2 part of the Apartment.
22. The Applicant filed an appeal with the District Court in Prishtina against the Judgment of the Municipal Court (C. No. C. No. 302/2007 of 10 June 2008).
23. On 24 February 2011, the District Court in Prishtina by Judgment Ac.No.1546/2008 approved the appeal of the Applicant and amended the Judgment of the Municipal Court (C. No. 302/2007 of 10 June 2008), whereby it approved the claim of the Applicant and decided that the Applicant is the owner of the part of the Apartment for 85.48 % and his former spouse, the owner of the part of the Apartment for 14.52 %.
24. In the above-mentioned Judgment, the District Court held:

[...]  
*“Since the first instance court has fully ascertained the factual situation, but the court erroneously applied the substantive law, when dividing assets of spouses as per contribution of marital spouses, and not in accordance with*

*their written agreement, therefore, the first instance judgment should have been modified and to ascertain the ownership of the apartment of this case as per contract Vr. No. 2709/82, of 12.08.1982, and the conclusion of the expert, which confirmed the ownership shares in percentage, as per contribution of spouses.”*

25. On 19 April 2011, the Applicant filed a proposal for Execution of the Judgment of the District Court in Prishtina (Ac. no. 1546/08 of 24 February 2011) with the Municipal Court in Prishtina, namely to oblige his former spouse to handover the possession of the Apartment to the Applicant.
26. On 6 June 2012, the Municipal Court rejected the proposed execution. Against the Decision of the Municipal Court in Prishtina, the Applicant filed an appeal with the District Court in Prishtina.
27. The District Court in Prishtina, by Decision (Ac. no. 574/2012 of 6 November 2012) approved the appeal of the Applicant as grounded and remanded the case for retrial to the Municipal Court in Prishtina.
28. Against the Judgment of the District Court in Prishtina (Ac. no. 1546/08 of 24 February 2011), the State Prosecutor filed a request for protection of legality and the former spouse of the Applicant, as a respondent-counterclaimant filed for a revision with the Supreme Court, alleging erroneous application of substantive law and violations of the provisions of the contested procedure.
29. On 1 February 2013, the Supreme Court, by Judgment Rev. Mlc.No.93/2011, approved as grounded the request for protection of legality and the revision of the respondent-counterclaimant, whereby it amended the Judgment of the District Court in Prishtina (Ac. No. 1546/2008 of 24 February 2011) in such a manner that the Judgment of the Municipal Court in Prishtina (C. No. 302/2007 of 10 June 2008) remained in force.
30. In the above-mentioned judgment, the Supreme Court held:

*[...]*

*“that the first instance court correctly applied the substantive law, in its finding that litigating parties are each owners of ideal halves to the apartment in dispute, as determined by the enacting clause of the Judgment.”*

31. The Supreme Court, in its Judgment further argued:

*[...]*

*“The contract on purchase of apartment (certified by the Municipal Court in Prishtina, on 12.08.1982), concluded between Afrim Karaxha and [the spouse], and the father of Afrim Karaxha, cannot be taken to be an agreement on division of common assets of the litigants, as erroneously found by the second instance court. The manner of purchase and acquisition of ownership over the apartment in dispute is determined by the contract on purchase and acquisition of ownership rights over the apartment, of 05.11.1980, and this is an asset of spouses created during the*



marital union. Therefore, the contract concluded later, on 12.08.1982, which the second instance court grounded its judgment upon; the intention of the litigants was not the division of their assets by agreement, since the apartment was bought already in 1980. This asset was governed by agreement of both spouses, and was registered in public books to the names of both spouses, in accordance with Article 310 of the same law, which provides that rights of the spouses on immovable items, which are common asset, are registered in public registers of immovable assets to both names of both spouses, as common property in undetermined shares.

Erroneous application of the substantive law also consists in the fact that the second instance court has not grounded its position on other provisions on marital co-ownership. Article 312, paragraph 2 of the LMF, explicitly excludes the possibility of contracting to the harm of common assets acquired in marriage.”

[...]

“The contributions of spouses cannot be measured as done by expertise, since the expert calculated the contribution by the loan taken by the spouses, and therefore, it cannot be considered as correct application of the law. Therefore, the revision and the request for protection of legality rightfully claim that the second instance judgment was rendered in erroneous application of material law, for which reason, this court modified the challenged judgment and upheld the first instance court judgment.”

[...]

### **Applicant's Allegation**

32. With regards to the Applicant's claims and request addressed to the Court, the Applicant's allegations are to be divided as following:

A. Allegation regarding the proceedings before the Municipal Court in Prishtina; and

B. Allegation regarding the Judgment of the Supreme Court.

33. Regarding the proceedings before the Municipal Court in Prishtina, the Applicant argues: [...] “the Municipal Court by its actions and, in some cases, by omissions has violated rights, guaranteed by domestic laws, by the Constitution of Kosovo and by the international acts. The Municipal Court has delayed the procedure, which is sensitive procedure and is connected to family relations, held around 15-16 court hearings from 10 April 2001 until 12 July 2005. The trial judge did not behave and did not treat equally the parties in the procedure. The latter neglected the permanent allegations of the Applicant for evaluation of separate property in the property of the marriage relationship, has rejected without any reason the Applicant's allegations for Imposition of Interim Measure of the joint property, has delayed the executive procedure of the second instance Judgment, did not allow so far the Applicant to use and possess his part of the property. The executive procedure by the Municipal Court has started with the proposal of the Applicant C. No. 572/11

*on 19.04.2011 and it has not been finished yet. The Applicant has been deprived arbitrarily from his part of the property by the Court's actions."*

34. In this respect, he alleges violation of Article 31.1 and 2 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution and Article 6, par. 1 [Right to a Fair Trial], and Article 1 of Protocol No.1 of the European Convention on Human Rights (hereinafter: ECHR).
35. Regarding the Judgment of the Supreme Court Rev. Mlc. 93/2011 of 1 February 2013, the Applicant argues that: [...] *"Supreme Court has decided same as the Municipal Court, has not administered as relevant evidence the separate property of the Applicant during the time of the marriage relationship, which allegations were presented all the time by the Applicant, in order to confirm the influence or non-influence of this evidence in the division of property. In the Judgment's reasoning, which was the last opportunity for the Applicant and on which the Applicant hoped to triumph the justice. The Court did not give clear legal-constitutional reasons in the aspect of facts-evidence, which are relevant for rendering a lawful decision, but immediately evaluated as ungrounded the Applicant's allegations. It has not mentioned at all Article 5 of the Contract, which clearly specified that in case of dispute in spouse-parental relations, the parties agreed that they will divide the apartment based on the investment of each person."*
36. The Applicant further argues that [...] *"due to rendering of incorrect Judgment by the Supreme Court, violation of rights of presentation of relevant evidence, honesty of the proceedings, that the interference of this nature is not proportional and sufficient to provide the individual for the procedural guaranties, which are necessary in a democratic society and especially in a society, which is going towards strengthening of principles and standards to fair trial and respect of the protection of human rights and freedoms, guaranteed by the Constitution and international acts."*
37. In this relation, the Applicant alleges violation of Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution, Article 6 [Right to a Fair Trial], and Article 1 of Protocol No.1 of ECHR, Article 7, Article 10 and Article 17 of the Universal Declaration of Human Rights.
38. The Applicant concludes by requesting the Court:

*"To declare the Applicant's Referral admissible.*

- *Pursuant to Rule 39 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo, to order the holding of a hearing session.*

- *To find a violation of the Applicant's individual rights of the Applicant Afrim Karaxha, as guaranteed by Articles 31, 46 and 54 of the Constitution of the Republic of Kosovo, Article 7, 10 and 17 of the Universal Declaration on Human Rights, Article 6 and Article 1 Protocol 1 of the European Convention on Human Rights, in the court proceedings of the Municipal*

*Court in Prishtina and in rendering the Judgment of the Supreme Court of Kosovo, and*

- *To determine any right or responsibility for the parties in the Referral that this honorable Court evaluates as legally and reasonably grounded.*

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

39. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to examine whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

40. In this respect, the Court refers to Article 113, paragraph 7, of the Constitution, which establishes that:

*"Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

41. In addition, Article 49 of the Law provides that *"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision"*.

42. In the instant case, the Court notes that all legal remedies provided by law have been exhausted. The Court also notes that the Applicant was served with the Supreme Court Judgment on 25 April 2013 and filed his Referral with the Court on 14 August 2013.

43. Thus, the Court considers that the Applicant is an authorized party and has exhausted all legal remedies afforded to him by the applicable law and the Referral was submitted within the four months time limit.

44. However, the Court also must take into account Rule 36 of the Rules, which provides:

*"(1) The Court may review referrals only if: (c) The referral is not manifestly ill-founded."*

*"(2) The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:*

*(b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or*

*[...], or*

*d) when the Applicant does not sufficiently substantiate his claim".*



### ***Allegation regarding the proceedings before the Municipal Court in Prishtina***

45. In this relation, the Applicant argues that: [...] *"The Municipal Court has delayed the procedure, which is a sensitive procedure and is connected to family relations, held around 15-16 court hearings from 10 April 2001 until 12 July 2005. The trial judge did not behave and did not treat equally the parties in the procedure. The latter neglected the permanent allegations of the Applicant for evaluation of separate property in the property of the marriage relationship, has rejected without any reason the Applicant's allegations for Imposition of Interim Measure of the joint property, has delayed the executive procedure of the second instance Judgment, did not allow so far the Applicant to use and posses his part of the property. The executive procedure by the Municipal Court has started with the proposal of the Applicant C. No. 572/11 on 19.04.2011 and it has not been finished yet. The Applicant has been deprived arbitrarily from his part of the property by the Court's actions."*
46. The Applicant alleges delay of proceedings by the Municipal Court in Prishtina during the period between 2001 and 2005 and the period after he filed a proposal for execution of the Judgment of the District Court in Prishtina Ac. No. 1546/08 of 24 February 2011.
47. With regards to the first aforementioned allegation, namely the period 2001-2005, in order to establish the Court's temporal jurisdiction, it is essential to identify, in each specific case, the exact timeframe of the alleged interference. In doing so, the Court must take into account both the facts of which the applicant complains and the scope of constitutional right alleged to have been violated (see, *mutatis mutandis*, Blečić v. Croatia, Application No. 59532/00, ECtHR, Judgment of 8 March 2006).
48. In this respect, the Court also refers to Rule 36 (3) (h), which establishes:
- [...]
- "(3) A Referral may also be deemed inadmissible in any of the following cases:*
- h) the Referral is incompatible rationae temporis with the Constitution."*
49. The Court notes that the Applicant's allegation regarding the court proceedings before the Municipal Court between 2001 and 2005 refer to a time period prior to 15 June 2008, the date when the Constitution entered into force, and before the Court had temporal jurisdiction. Therefore the Applicant's aforementioned allegations are considered as incompatible *ratione temporis* with the Constitution (see, KI25/09, Applicant Shefqet Haxhiu, Resolution on Inadmissibility of 25 June 2010).
50. With regards to the proceedings on the execution of the Judgment of the District Court in Prishtina (Ac. No. 1546/08 of 24 February 2011), the Court notes that the Municipal Court in Prishtina in its Decision of 6 June 2012 rejected as ungrounded the Applicant's proposal on the execution of the aforementioned Judgment.

51. The Municipal Court in Prishtina reasoned its Decision, holding that the Judgment of the District Court of 24 February 2011, for which the Applicant proposed the execution, does not contain elements of execution, as provided by Article 26 of the Law on Executive Procedure.
52. Against the aforementioned Decision, the Applicant had filed an appeal with the District Court in Prishtina, which decided (Decision of 6 November 2012) to remand the case for retrial in the Municipal Court in Prishtina. In the meantime, namely on 1 February 2013, the Supreme Court, by its Judgment, decided to amend the Judgment of the District Court in Prishtina (Ac. No. 1546/08 of 24 February 2011), for which the Applicant proposed the execution, and decided to uphold the Judgment of the Municipal Court in Prishtina.
53. In this respect, the Applicant did not substantiate his allegations by demonstrating how the delay of the execution of the Judgment of the District Court in Prishtina (Ac. No. 1546/08 of 24 February 2011) by the Municipal Court in Prishtina violated his rights guaranteed by the Constitution.
54. Based on the case files, the Applicant has not raised this delay of execution proceedings before the regular courts, neither he has proved that he tried to accelerate the proceedings.
55. Therefore, this Applicant's allegation is manifestly ill-founded.

### ***Allegation regarding the Judgment of the Supreme Court***

56. Regarding the Judgment of the Supreme Court, the Applicant argues that: [...] *"Supreme Court has decided same as the Municipal Court, has not administered as relevant evidence the separate property of the Applicant during the time of the marital union, which allegations were presented all the time by the Applicant, in order to confirm the influence or non-influence of this evidence in the division of property. In the Judgment's reasoning, which was the last opportunity for the Applicant and on which the Applicant hoped to triumph the justice. The Court did not give clear legal-constitutional reasons in the aspect of facts-evidence, which are relevant for rendering a lawful decision, but immediately evaluated as ungrounded the Applicant's allegations. It has not mentioned at all Article 5 of the Contract[12 August 1982], which clearly specified that in case of dispute in spouse-parental relations, the parties agreed that they will divide the apartment based on the investment of each person."*
57. In the Applicant's case, the Supreme Court upheld the Judgment of the Municipal Court in Prishtina and amended the Judgment of the District Court in Prishtina (Ac. No. 1546/08 of 24 February 2011), whereby it concluded that the District Court in Prishtina had erroneously applied the substantive law.
58. In this respect, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the Supreme Court, unless and in so far as it may have infringed rights and freedoms protected by the Constitution.

59. The Court further reiterates that it is not its task under the Constitution to act as a court of fourth instance, in respect of the decisions taken by the regular courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (See, *mutatis mutandis*, García Ruiz v. Spain, No. 30544/96, ECtHR, Judgment of 21 January 1999, para. 28; see also case No. KI70/11, Applicants Faik Hima, Magbule Hima and Bestar Hima, Resolution on Inadmissibility of 16 December 2011).
60. The Constitutional Court can only consider whether the evidence has been presented in a correct manner and the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see, *inter alia*, Edwards v. United Kingdom, Application No. 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991).
61. The Supreme Court in its Judgment clearly reasoned that; [...] "*The contract on purchase of apartment (certified by the Municipal Court in Prishtina, on 12.08.1982), concluded between Afrim Karaxha and [the spouse], and the father of Afrim Karaxha, cannot be taken to be an agreement on division of common assets of the litigants, as erroneously found by the second instance court. The manner of purchase and acquisition of ownership over the apartment in dispute is determined by the contract on purchase and acquisition of ownership rights over the apartment, of 05.11.1980, and this is an asset of spouses created during the marital union*" and confirmed that: [...] "*that the first instance court correctly applied the substantive law, in its finding that litigating parties are each owners of ideal halves to the apartment in dispute and [...] the second instance judgment was rendered in erroneous application of substantive law, for which reason, this court modified the challenged judgment and upheld the first instance court judgment.*"
62. Therefore, the Court notes that the reasoning in the Judgment of the Supreme Court is clear and, after having reviewed all the proceedings, the Court has also found that the proceedings before the regular courts have not been unfair or arbitrary (See, *mutatis mutandis*, Shub vs. Lithuania, no. 17064/06, ECtHR, Decision of 30 June 2009).
63. For the aforementioned reasons, the Court considers that the facts presented by the Applicant do not in any way justify the allegations of a violation of his constitutional rights.
64. Therefore, the Court concludes that the Applicant's Referral is inadmissible.

## **FOR THESE REASONS**

The Constitutional Court, pursuant to Rules 36 (1) c), 36 (2) b) and 36 (3), h) of the Rules of Procedure, on 20 January 2014, unanimously:

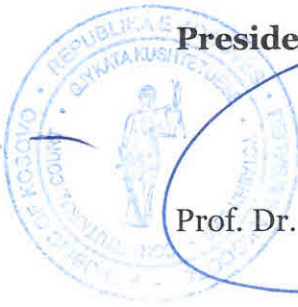
### **DECIDES**

- I. TO DECLARE the Referral as Inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- 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

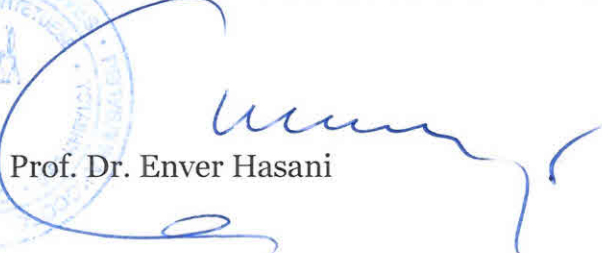
**Judge Rapporteur**



Snezhana Botusharova



**President of the Constitutional Court**



Prof. Dr. Enver Hasani