



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

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**Pristina, 9 October 2013  
Ref. No.: RK476/13**

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI129/13**

Applicant

**Daut Çejku**

**Constitutional review  
of the Judgment of the Supreme Court Pml.No.83/2013, dated 19 June  
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.

#### **Applicant**

1. The Referral was submitted by Daut Çejku from Prizren, represented by Hazër Susuri (the Applicant).

## **Challenged Decision**

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo Pml. No. 83/2013, dated 19 June 2013, which was served on him on 15 July 2013.

## **Subject Matter**

3. The Applicant alleges that the Judgment of the Supreme Court, rejecting his request for protection of legality against the Judgment of the District Court in Prishtina (Ap. No. 388/2009 of 28 September 2012) violated his rights guaranteed by the Constitution, namely Articles 31 [Right to Fair and Impartial Trial] and 36. 2 [Right to Privacy] of the Constitution, and Article 6.1 of the European Convention on Human Rights (hereinafter, the ECHR).
4. In addition, the Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter, the Court) to impose interim measures pursuant to Article 27 of the Law, namely to suspend the execution of the Judgment of the District Court in Prishtina (Ap. No. 388/2009 of 28 September 2012) until 31 December 2012, which sentenced the Applicant to imprisonment of 6 (six) months.

## **Legal Basis**

5. The Referral is based on Article 113.7 of the Constitution, in conjunction with Article 22 of the Law No. 03/L-121 on Constitutional Court and Rules 54, 55 and 56. 2 of the Rules of Procedure (hereinafter, the Rules).

## **Proceedings before the Court**

6. On 21 August 2013, the Applicant submitted the Referral to the Court.
7. On 28 August 2013, the President appointed Judge Almiro Rodrigues as Judge Rapporteur. The Review Panel consists of Judges Altay Suroy (presiding), Ivan Čukalović and Kadri Kryeziu.
8. On 28 August 2013, the Constitutional Court informed the Applicant on the registration of the Referral and requested the full text of the Judgment of the Supreme Court (Pml.No.83/2013 of 19 June 2013). On the same date, the Court also informed the Supreme Court on the Referral.
9. On 30 August 2013, the Applicant provided the Court with the full text of the Judgment of the Supreme Court.
10. On 10 September 2013, the Review Panel considered the report of the Judge Rapporteur and deliberated on the matter and made a recommendation to the Court on the inadmissibility of the Referral.

## **Summary of the Facts**

11. It appears that the Applicant is a medical doctor practising at the University Clinical Centre of Kosovo, a public health care facility. During July 2008 and on several occasions, the Applicant was consulted by the patient Mr. X, regarding a

problem with the veins in his legs. At some point, the Applicant recommended to Mr. X to undergo surgery. Allegedly, the Applicant informed Mr. X that he could have this surgery performed at a private clinic for 700 EUR or at University Clinical Centre of Kosovo for 300 EUR.

12. Mr. X subsequently reported to the police that the Applicant had requested a bribe of 300 EUR to perform an operation. The police made photocopies of 3 one hundred euro banknotes provided by Mr. X and noted the serial numbers on these banknotes.
13. On 12 August 2008, Mr. X appeared in the office of the Applicant and offered 3 one hundred euro banknotes to the Applicant. At some point, the Applicant placed the banknotes in his pocket. The Applicant referred Mr. X to an examination room. At that moment, two persons identified themselves as police officers and confronted the Applicant regarding the 300 euro. The Applicant produced the 3 one hundred euro banknotes from his pocket following a request by the two police officers, as reflected from the judgments of the regular courts and from the Applicants own statements, *inter alia*, from his submissions on appeal to the District Court. The Applicant was then arrested and subsequently indicted.
14. On 13 March 2009, the Municipal Court in Prishtina (Judgment P.No.2214/08) sentenced the Applicant to imprisonment of 8 (eight) months for having committed the criminal offence foreseen in Article 343.1 of the Criminal Code of Kosovo (Taking Bribes).
15. On 12 June 2009, the Applicant filed an appeal with the District Court in Prishtina against the Judgment of the Municipal Court in Prishtina, because of:

*“Essential violation of CPCK (Article 403 paragraph 1 subparagraph 8 and 12)  
Violation of LCP (Article 404 paragraph 1 and 2)  
Erroneous assessment and incomplete confirmation of the factual situation (Article 405 paragraph 1 subparagraph 1 and 2), and  
For the decision on sentence (Article 406 paragraph 1)”.*
16. On 28 September 2012, the District Court in Prishtina (Judgment Ap.No.388/2009) sentenced the Applicant to six (6) months imprisonment.
17. The District Court in Prishtina held that *“On the appeal of the defence council of the defendant it is alleged that the appealed Judgment consists of essential violations of provisions of the criminal procedures from Article 403 paragraph 1 item 8 and 12 of CPCK. However, specific reasons are not provided in the reasoning of the appeal as to what do these violations manifest, but it is only emphasized that the enacting clause of the Judgment is incomprehensible in the reasoning, alleging that this matter was prepared beforehand in order to blemish the name of a prominent doctor of vascular surgery, while the provided reasons mainly refer to the factual situation”.*
18. The District Court in Prishtina further held that [...] *“Judgment of the first instance Court doesn’t contain any essential violations of provisions of the*

*criminal procedures referred to by the appeal of the defence of the defendant. In absence of a genuine reasoning of this appeal, this Court assessed that the challenged Judgment is in compliance with Article 415 of CPCCK [...].*

19. The District Court in Prishtina also considered that the allegations of erroneous assessment and incomplete determination of factual situation were unfounded. In this regard, the District Court held that [...] *“accurately and in an undoubted manner it was determined that the defendant carried out incriminating actions mentioned in the enacting clause of the appealed Judgment”* and concluded that the allegation on the absence of elements of a criminal offence, for which the Applicant was found guilty, is unfounded.
20. On 10 May 2013, the Applicant filed a request for protection of legality with the Supreme Court of Kosovo, for the following reasons:
  1. *“Violation of the criminal law from Article 404 paragraph 1, subparagraph 1 of the CPCCK in conjunction with Article 343.1 of the CCK; and*
  2. *Essential violation of provisions of the criminal procedures, from Article 403 paragraph 1, subparagraphs 8 and 12 of the CPCCK”.*
21. In sum, the Applicant concluded that *“the Judgment issued by the first instance Court and the one of second instance Court consist of essential violations of provisions of the criminal procedures provided by provisions of Article 403 paragraph 1 item 8 of CPCCK, because the appealed Judgments are based on inadmissible evidence”.*
22. On 19 June 2013, the Supreme Court (Judgment Pml.No.83/2013) decided to *“deny as unfounded the request for protection of legality”.*

### **Allegations of the Applicant**

23. The Applicant claims that *“the Courts rendered their Judgment based on inadmissible evidence and that in the case of the search by the police an order of the pre-trial Judge was missing. Thus, the Judgment of the Supreme violated his rights guaranteed by the Constitution, namely Article 31 [Right to Fair and Impartial Trial], 36. 2 [Right to Privacy] of the Constitution and Articles 6 [Right to Fair Trial] and 8 [Right to Private and Family Right] of the ECHR”.*
24. The Applicant argues that the Judgments rendered by the regular courts violated his rights [...] *“because the case (...) was not heard fairly by the regular Courts, because the regular Courts rendered their judgments based on inadmissible evidence, respectively evidence collected in contradiction with the provisions as mentioned above and in violation of provisions of Article 31 of the Constitution of the Republic of Kosovo and Article 6 of ECHR and deprived the Applicant to be found innocent before a court [...]”.*
25. The Applicant further points out to *“unlawful actions of securing the evidence through covert measures and techniques of surveillance and investigation as foreseen by Article 258, paragraph 2, subparagraph 9 of CPCCK (simulation of*

*a corruption offence). The Applicant alleges that “we are facing a simulation of a corruption offence, which as such, (...) was done in an unconstitutional manner because the evidence provided and administered were taken on an unlawful manner, respectively unconstitutional manner”.*

26. Thus, the Applicant concludes that, pursuant to Article 36. 2 [Right to Privacy] of the Constitution, *“the entry of the police in the premises of Dr. Çejku is conducted only to the necessary extent and only after approval by Court, after presenting the reasons why such a search is necessary, which in Applicants’ case the Court Order is missing, namely the order of the Pre-trial Judge of the Municipal Court in Prishtina for the search of official premises and the private search of Dr. Çejku as a suspect”.*
27. The Applicant concludes requesting the Constitutional Court:
1. *“To declare the referral as admissible;*
  2. *To conclude that there were violations of Article 36, paragraph 2 (The Right to Privacy) of the Constitution of the Republic of Kosovo, Article 8 of ECHR (The Right to Respect for Private and Family Life) and Article 31 of the Constitution of the Republic of Kosovo (The right to a fair and impartial trial) and Article 6 of ECHR (The Right to a Fair Trial);*
  3. *To annul the Judgment Pml.nr.83/2013 of June 19<sup>th</sup>, 2013 of the Supreme Court of Kosovo;*
  4. *To reverse for retrial the Judgment Pml.nr.83/2013 of June 19<sup>th</sup>, 2013 of the Supreme Court of Kosovo, in compliance with the Judgment of the Constitutional Court;*
  5. *To grant the INTERIMMEASURE for the Applicant, Dr. Daut Çejku, in order not to execute the serving of imprisonment sentence until the time when the Supreme Court of Kosovo re-decides on the matter pursuant to ratio decidendi of the Constitutional Court”.*

### **Admissibility of the Referral**

28. First of all, the Court examines whether the Applicant has fulfilled the Referral admissibility requirements.
29. In that respect, Article 113 of the Constitution provides:
- “1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties”.*
- (...)
- “7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhausting all legal remedies provided by law”.*
30. 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”.*

31. In the instant case, the Court notes that the Applicant has sought recourse to protect his rights before the Municipal and District Courts and, finally, before the Supreme Court of Kosovo. The Court also notes that the Applicant was served with the Supreme Court Judgment on 15 of July 2013 and filed his Referral with the Court on 21 August 2013.
32. 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.
33. Consequently, the Court concludes that the Referral meets the admissibility requirements set up by Article 113.1 and 113.7 of the Constitution and by Article 49 of the Law.
34. 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:*

*[...], or*

*(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;”*
35. The Applicant, as said above, challenged the Judgment of the District Court, before the Supreme Court for violation of the criminal law and essential violation of provisions of the criminal procedure.
36. The Court notes that, for a prima facie case on the merits of the request on interim measures and on the admissibility of the Referral, the Applicant must show that the proceedings in the Supreme Court, viewed in their entirety, have not been conducted in such a way that the Applicant has had a fair trial or other violations have been committed by the Supreme Court.
37. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
38. The Court notes that no allegation on inadmissible evidence was made before the District Court and the allegations made by the Applicant before the Supreme Court are grounded on a violation of the criminal law and a violation of provisions of the criminal procedure.

39. However, the allegations made by the Applicant before the Constitutional Court are grounded on violations of his right to a fair and impartial trial (Article 31 of the Constitution and Articles 6 of the ECHR) and right to privacy (Article 36. 2 of the Constitution and Article 8 of the ECHR), mainly because the appealed Judgments are based on inadmissible evidence. The Applicant considers that the evidence is inadmissible because obtained by a search executed by the police without an order from a pre-trial judge.

**Alleged violations of the right to a fair and impartial trial (Article 31 of the Constitution and Articles 6 of the ECHR)**

40. On one hand, the Court notes that the Supreme Court reasoned its Judgment holding that *“despite the fact that the control and seizure of the money was completed without the order of the pre-trial Judge (As foreseen in Article 240, paragraph 1 of the CPCK) in the present case an oral order of the Public Prosecutor exists. However, considering the fact that the convicted has been caught in flagrante during the commission of the criminal offence, who was later arrested, in such cases the police can take actions without the order of the pre-trial judge, as foreseen in Article 245, paragraph 1, aline 3 of the CPCK.”*
41. The Court considers that the Supreme Court answered the allegation on inadmissible evidence, reasoning that not only an oral order of the Public Prosecutor exists, but also that the convicted has been caught in flagrante during the commission of the criminal offence and, in such cases, the police can take actions without the order of the pre-trial judge.
42. On the other hand, the Court also notes that the Supreme Court concluded that [...] *“it is the right of the court to evaluate the existence or non-existence of facts, which is not associated or limited to special formal rules. According to Article 396, paragraph 7 of the Criminal Procedure Code, the Court is obliged to submit in a specific and full manner which facts and for what reasons to consider or not consider as evidence, as such assessing the accuracy of contradictory evidence. In the present case, the Courts have acted in accordance with the provisions of the Criminal Procedure Code, meaning that the challenged Judgments are not based on inadmissible evidence.”*
43. The Court considers that the justification provided by the Judgment of the Supreme Court in answering the allegations made by the Applicant is clear and well reasoned. Furthermore, the given justification covers the allegations made by the Applicant on the basis of the Criminal and Criminal Procedure Codes and the allegations made on violation of the Applicant's individual rights and freedoms guaranteed by the Constitution and the ECHR.
44. In this connection, the Constitutional Court 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 regular courts 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).

45. The Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general and viewed in its entirety have been conducted in such a way that the Applicants had a fair trial (See, *inter alia*, Edwards v. United Kingdom, No. 13071/87, Report of European Commission of Human Rights of 10 July 1991).
46. The Court considers that the proceedings before the regular courts, including before the Supreme Court, have been fair and reasoned (See, *mutatis mutandis*, Shub v. Lithuania, No. 17064/06, ECtHR, Decision of 30 June 2009).
47. Thus, the Applicant has not submitted any *prima facie* evidence indicating a violation of his rights under the Constitution (See Vanek v. Slovak Republic, No. 53363/99, ECtHR, Decision of 31 May 2005) and did not specify how Articles 31 of the Constitution supports his claim, as required by Article 113.7 of the Constitution and Article 48 of the Law.
48. In fact, the Applicant has neither built a case nor brought evidence on that the police can conduct a search only with an order of the pre-trial judge even more, and including, when a person is caught in flagrante, during the commission of the criminal offence.
49. In sum, the Court Considers that the Applicant has not justified that the evidence is also inadmissible when the police conducts a search when a perpetrator is caught in the act of committing a criminal offence.
50. Furthermore, the Court notes that the Applicant's conviction is not based exclusively on the evidence of the banknotes found in the Applicant's possession.

**Alleged violation of the right to privacy (Article 36. 2 of the Constitution and Article 8 of the ECHR)**

51. In addition, the Applicant complains of a violation of Article 36. 2 of the Constitution. The Applicant alleges that, on 12 August 2008, the police confronted him in his office regarding the receipt of the 3 one hundred euro banknotes and conducted a search without any authorization of a court, either prior to this search or retroactively following the search.
52. Article 32.2 of the Constitution establishes that:

*"2. Searches of any private dwelling or establishment that are deemed necessary for the investigation of a crime may be conducted only to the extent necessary and only after approval by a court after showing the reasons why such a search is necessary. Derogation from this rule is permitted if it is necessary for a lawful arrest, to collect evidence which might be in danger of loss or to avoid direct and serious risk to humans and property as defined by law. A court must retroactively approve such actions". (Emphasis added)*



53. The Court notes that, when the police confronted the Applicant, in his office at the University Clinical Centre of Kosovo, regarding his receipt of a sum of money, the Applicant voluntarily produced the 3 one hundred euro banknotes from his pocket.
54. The Court further notes that the evidence was immediately seized from the person of the Applicant to prevent the danger of it being lost, the Applicant was not in a private dwelling or establishment when the evidence was seized, and the Applicant was then arrested and subsequently indicted.
55. Thus, the Court considers that Article 36. 2 of the Constitution generally establishes that the police needs to obtain the approval of a court to search and seize evidence from *any private dwelling or establishment*. However, the Constitution makes exception from this rule “.....if it is necessary for a lawful arrest, to collect evidence which might be in danger of loss”.
56. In these circumstances, the Court concludes that the event complained of does not come within the meaning of a ‘search of a private dwelling or establishment’, as provided by Article 36. 2 of the Constitution.
57. Therefore, the Court dismisses the Applicant’s allegation on that his rights under Article 36. 2 of the Constitution have been violated.
58. In sum, the allegations of a violation of his constitutional rights to a fair and impartial trial (Article 31 of the Constitution and Article 6 of the ECHR) and right to privacy (Article 36. 2 of the Constitution and Article 8 of the ECHR), because the appealed judgments are based on inadmissible evidence, is ungrounded and unsubstantiated and thus manifestly ill-founded.
59. Thus, in accordance with Rule 36. 1 c) and 2 b) and d), the Referral is inadmissible.

### **Request for Interim Measures**

60. The Applicant requests from the Court to impose the interim measures of “*suspending the Decision of the District Court in Prishtina Ap.No.388/2009 of September 28<sup>th</sup>, 2012 which orders the convicted to serve the imprisonment sentence for the period of 6 (six) months*”.
61. The Applicant argues that “*Execution of Judgment Ap.nr.388/2009 of the District Court in Prishtina of September 28<sup>th</sup>, 2012 [...] as unconstitutional would deprive the Applicant [...] from freedom for 6 (six) months, thus inflicting irreversible and unavoidable damage [...]*”.
62. In this respect, the Court takes into account that, in accordance with Rule 55. 1 of the Rules, “*A request for interim measures shall be given expedited consideration by the Court and shall have priority over all other referrals.*” and also Rule 55. 6 foreseeing that “[...] *The recommendation of the Review Panel on the application for interim measures shall become the decision of the Court unless one or more Judges submit an objection to the Secretary within three (3) days. [...]*”.

63. The Court also takes into account Article 116. 2 [Legal Effect of Decisions] of the Constitution which establishes:

*“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”.*

64. Article 27 of the Law and, in particular, Rule 54. 1 of the Rules of Procedure, provide that *“when a referral is pending before the Court and the merits of the referral have not been adjudicated by the Court, a party may request interim measures.”*

65. In addition, in order for the Court to grant interim measure pursuant to Rule 55. 4 of the Rules, it must find, namely, that:

*“(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*

66. As concluded above, the Referral is inadmissible, and therefore there is no *prima facie* case for the purpose of imposing interim measures and thus the request for interim measures is manifestly ill-founded.

## FOR THESE REASONS

The Constitutional Court, pursuant to Article 113, paragraphs 1 and 7 of the Constitution, Articles 20 and 27 of the Law and Rules 36.2, 54, 55 and 56 of the Rules, on 12 September 2013, unanimously:

## DECIDES

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

**Judge Rapporteur**



Almiro Rodrigues



**President of the Constitutional Court**



Prof. Dr. Enver Hasani