



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

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Prishtina, 31 March 2014  
Ref. No.: RK 590/14

## RESOLUTION ON INADMISSIBILITY

in

**Case No. KI32/14**

Applicant

**Arben Krasniqi**

**Constitutional Review of the Decision of the Pre-trial Judge of the Basic  
Court in Prishtina, PKRNR 47/13, PPS No. 107/2012  
of 20 January 2014**

### 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 Applicant is Mr. Arben Krasniqi (hereinafter: the Applicant), with residence in Prishtina, represented by Dr. Donat Ebert, a practicing lawyer registered with the Bar in Germany and Hungary.

## **Challenged Decision**

2. The Applicant challenges the Decision of the Pre-trial Judge of the Basic Court in Prishtina, PKRNR 47/13, PPS No. 107/2012, dated 20 January 2014, served on the Applicant on an unspecified date.

## **Subject Matter**

3. The subject matter is the constitutional review of the Decision of the Pre-trial Judge of the Basic Court in Prishtina, PKRNR 47/13, PPS No. 107/2012, dated 20 January 2014. In its Decision, the Pre-trial Judge of the Basic Court in Prishtina rejected the request of the Applicant for full access to case files.
4. The Applicant also requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure, namely to oblige the Pre-trial Judge to order the Prosecution to grant the Applicant full access to the parts of the case files, that are allegedly the grounds for ordering the Applicant's detention on remand.

## **Legal basis**

5. The Referral is based on Article 113.7 of the Constitution, Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 54, 55 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Proceedings before the Court**

6. On 19 February 2014, the Applicant submitted the Referral to the Constitutional Court.
7. On 25 February 2014, the President of the Court based on Decision GJR. KI32/14 appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Court based on Decision KSH. KI32/14 appointed the Review Panel composed of Judges, Almiro Rodrigues (presiding), Ivan Čukalović and Enver Hasani.
8. On 25 February 2014, the Constitutional Court informed the Applicant on the registration of the Referral and requested the following additional documents: 1. Decision on detention on remand; 2. Decision/Decisions for protective measures which are referred to in the case file; and 3. Request for access to the case file submitted to the Special Prosecution Office of the Republic of Kosovo.
9. On the same date, the Court also notified the Pre-trial Judge of the Basic Court in Prishtina and the Office of the Special Prosecution of the Republic of Kosovo on the Referral.
10. On 6 March 2014, the Applicant submitted to the Court additional documents.

11. On 12 March 2014, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court to declare the Referral as inadmissible and to reject the request for interim measures.

### **The Facts of the Case**

12. The Applicant, pursuant to the Decision on Initiation of Investigation, dated 6 March 2013, is being investigated for the following criminal offences: Organised Crime, contrary to Article 283, paragraph 2, of the Criminal Code of Kosovo (hereinafter: the CCK), in conjunction with criminal offence of Extortion, contrary to Article 340, paragraph 2, of the CCK, punishable by a fine of up to five hundred thousand (500,000) EUR and by imprisonment of at least ten (10) years.
13. Following a search conducted on 28 October 2013 at the Applicant's residence in Prishtina, the Applicant is further being investigated for unauthorised ownership, control and possession of weapons, contrary to Article 374, paragraph 1, of the CCK, punishable by a fine of up to (7,500) EUR and imprisonment of up to five (5) years.
14. The Applicant has been on detention on remand since 28 October 2013.
15. On 20 November 2013, the Applicant had submitted a request for access to the case files to the Office of the Special Prosecution Office of the Republic of Kosovo.
16. On 28 November 2013, the Special Prosecution Office in its Decision decided the following:
  - “1. Defence Counsel for the defendant Arben Krasniqi shall have access to the case file to the extent that Article 213, par. 3 permits.*
  - 2. Defence Counsel for the defendant Arben Krasniqi shall not have access to other materials in the case file.*
  - 3. Defence Counsel will be notified, and invited to participate in, all investigative actions for which there is an obligation on the State Prosecutor to provide such notification and/or invitation.”*
17. Regarding the part of the Decision for not granting access to other materials in the case file, the Special Prosecution Office reasoned as following:

[...]

*“Whilst pursuant to Article 213, par. 2 CPCK [Criminal Procedure Code of Kosovo] there is a positive obligation on the Prosecutor to allow a defendant or his defence counsel access to the case file (“general access”), that obligation is subject to the exceptions provided within Article 213. It is on the basis of those exceptions, and provisions regarding protective measures for witnesses, that a “general access” to the case file is refused.”*

[...]

*“This is an on-going investigation against a potentially large, organised criminal group. To allow the Defence Counsel to have general access to the case files has potential seriously to jeopardise the purpose of the investigation, namely to discover the full extent of the illegal activities of the organised criminal group and its members. In addition, general accesses to the case file may endanger the lives and health of people. Whilst there are a number of witnesses who have been afforded protective measures by the court, access to the case files could lead to the discovery of the identity of those present and future witnesses who have nor, or are not, given those same measures. Given the modus operandi of the organised criminal group – that is, the use of serious threats and violence for the purpose of monetary gain – it is not unreasonable to expect that were members of the organised criminal group to discover the identity of witnesses ( current or potential) then steps would be taken – including the violence – to prevent them from cooperating with the criminal investigation and any future court proceedings.*

*[...]*

*“In addition to a reliance on the exceptions provided in Article 213, par. 6, the undersigned Prosecutor relies on Article 222, par. 2 CPCR, which clearly indicates that where other provisions of the CPCR conflict with the protective measures provided to a witness, the other CPCR provisions shall not apply.”*

18. On 21 November 2013, the Special Prosecution Office rendered a Decision on Expansion of the Investigations.
19. On 7 January 2014, the Applicant filed a motion with the Basic Court in Prishtina, requesting the Pre-trial Judge to oblige the State Prosecutor:

*“1. To supply defence with full access to the complete case file in the possession of the prosecution as concerns the investigation against Arben Krasniqi,  
2. in case there might be profound justification to deny full access to the named case file to supply all documents that do not contain privileged information,  
3. alternatively to supply defence with a redacted version of the full case file or unprivileged parts of it.”*

20. The Applicant concluded his request submitted to the Pre-trial Judge, arguing:

*“Here it is important to see that the objects of the alleged crimes and the alleged witnesses seem to be identical. This makes it easy for the prosecution to assert that when their identity is disclosed, there is a high danger of tampering with evidence by threatening the witnesses on the one hand, and on the other hand there is profound suspicion against the defendants without giving the defense the slightest chance to contest this and assess the validity of these claims.*

*[...]*

*To summarize it can be said that the refusal to give any access to the case file is neither in line with the ECHR, nor with the CPC of the Republic of Kosovo and this needs to be healed by an order of the pre-trial judge.”*

21. On 20 January 2014, the Pre-trial Judge of the Basic Court in Prishtina, with its Decisions PKRNR 47/13, PPS No. 107/2012 rejected the Applicant’s request for access to case files.
22. In its aforementioned Decision, the Pre-trial Judge held the following:  
  
[...]  
  
*“The Pre-trial Judge considers that defendant’s rights were not violated by denying access to witnesses’ statements and ruling on initiation of investigation because these rights are subject of protective measures. This is explicitly foreseen in paragraph 8 of Article 213 of CPCK. Moreover Article 222, par. 2 of the CPCK provides that other provisions of the CPCK shall not apply where they conflict with protective measures. The Court concludes that granting such access would conflict with protective measures ordered by this Court.”*
23. The Pre-trial Judge concluded that: *“Balancing the right of defendants and the defence counsels to have access to some parts of the case file and the potential danger to lives or health of people who were granted protective measures the Court considers the latter should prevail. The Court is bound by principle of innocence at this stage however, high consideration should also be given to the fact that all witness hesitated to testify until they were granted protective measures.”*
24. The aforementioned Decision of the Pre-trial Judge contains the following legal advice: *“This ruling is final thus no appeal shall be permitted against it (Article 213, par. 6 of the CPCK)”*
25. Based on the case files, at this stage, an Indictment has not yet been issued.

### **Applicant’s allegations**

26. The Applicant alleges that the Decision of the Pre-trial Judge of 20 January 2014 violated the principle of equality of arms, which according to the Applicant is guaranteed by Article 5 [Right to Liberty and Security] and Article 6 [Right to a Fair Trial] of the European Convention on Human Rights (hereinafter: the ECHR).
27. The Applicant argues that: *“[...] the prosecution is obliged to give full access to the whole of the case file as it is taken as grounds for the ordering of the detention on remand. Otherwise neither the defendant nor his defense counsel can check whether detention on remand is lawful or not.”*
28. The Applicant further argues that:

*“The Criminal Procedure Code of the Republic of Kosova leaves room for the prosecution to redact the file and for example make the identities of the witnesses unrecognizable.*

*The argumentation of the Pre-trial judge that the circumstance of the witnesses’ testimonies themselves already would make their identities recognizable cannot convince. It lies in the nature of it that a description of an alleged crime or offence is so specific that it would make the author of the testimony identifiable. This is practically always the case, unless the testimony has no resemblance with real factual circumstances.*

*Without any information as to the testimonies of the witnesses it is impossible to verify the truth of their statements and their credibility.”*

29. The Applicant concludes requesting the Court:

*“- Oblige the pre-trial judge to give an order to the prosecution to give the undersigned full access to the parts of the file that are actually the grounds for the ordering of detention on remand.*

*- Pass an interim measures to oblige the court to do so as quickly as possible.”*

### **Relevant provisions of the Criminal Procedure Code of the Republic of Kosovo No. 04/ L-123**

1. Article 213 [Access to the Case File by Suspects and Defendants]

*“1. During initial steps by the police, the suspect shall have access to the evidence that is collected upon his or her request, except when paragraph 6 or 7 of this Article is applied mutatis mutandis*

*2. At the initiation of the investigative stage, the state prosecutor has a positive obligation to provide access to the case file to any named defendant or their defense counsel, subject to the exceptions within this Article.*

*3. At no time during the investigative stage may the defense be refused inspection of records of the examination of the defendant, material obtained from or belonging to the defendant, material concerning such investigative actions to which defense counsel has been or should have been admitted or expert analyses.*

*4. Upon completion of the investigation, the defense shall be entitled to inspect, copy or photograph all records and physical evidence available to the court.*

*5. Upon the filing of an indictment, the defendant or defendants named in the indictment may be provided with a copy or copies, respectively, of the case file.*

*6. In addition to the rights enjoyed by the defense under paragraphs 2, 3 and 4 of the present Article, the defense shall be permitted by the state prosecutor to inspect, copy or photograph any records, books, documents, photographs and other tangible objects in the possession, custody or control of the state prosecutor which are material to the preparation of the defense or are intended for use by the state prosecutor as evidence for the purposes of the main trial, as the case may be, or were obtained from or belonged to the defendant. The state prosecutor may refuse to allow the defense to inspect, copy or photograph specific records, books, documents,*

photographs and other tangible objects in his or her possession, custody or control if there is a sound probability that the inspection, copying or photographing may endanger the purpose of the investigation or the lives or health of people. In such case, the defense can apply to the pre-trial judge, single trial judge or presiding trial judge to grant the inspection, copying or photocopying. The decision of the judge is final.

7. Information can be redacted or marked out by a thick black line to obscure specific information by the state prosecutor on copies of documents that contain sensitive information. The defendant may challenge the redaction with the pretrial judge, single trial judge or presiding trial judge within three (3) days of receiving the redacted copy.

The state prosecutor shall be permitted the opportunity to explain the legal basis of the redaction without disclosing the sensitive information. The judge shall review the redacted information and shall decide within three (3) days whether the redaction is legally justified.

8. Provisions of the present Article are subject to the measures protecting injured parties and witnesses and their privacy and the protection of confidential information as provided for by law.”

## 2. Article 222, (1) and (2) [Order for Protective Measures]

“1. The competent judge may order such protective measures as he or she considers necessary, including but not limited to:

1.1. omitting or expunging names, addresses, place of work, profession or any

other data or information that could be used to identify the injured party, cooperative witness or witness;

1.2. non-disclosure of any records identifying the injured party, cooperative witness or witness;

1.3. efforts to conceal the features or physical description of the injured party,

cooperative witness or witness giving testimony, including testifying behind an opaque shield or through image or voice-altering devices, contemporaneous examination in another place communicated to the courtroom by means of closed circuit television, or video-taped examination prior to the court hearing with the defense counsel present;

1.4. assignment of a pseudonym;

1.5. closed sessions to the public;

1.6. orders to the defense counsel not to disclose the identity of the injured party, cooperative witness or witness or not to disclose any materials or information that may lead to disclosure of identity;

1.7. temporary removal of the defendant from the courtroom if a cooperative

witness or witness refuses to give testimony in the presence of the defendant or if circumstances indicate to the court that the witness will not speak the truth in the presence of the defendant; or

1.8. any combination of the above methods to prevent disclosure of the identity of the injured party, cooperative witness or witness.

2. Other provisions of the present Code shall not apply where they conflict with protective measures under paragraph 1 of the present Article.”

## Admissibility of the Referral

30. In order to be able to adjudicate the Applicant's Referral, the Court needs to examine beforehand whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, as further specified in the Law and the Rules of Procedure of the Court.
  31. In this respect, Article 113, paragraph 7, of the Constitution 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.”*
  32. 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.”*
  33. In the present case, the Court notes that the Decision of the Pre-trial Judge to reject the Applicant's request for full access to the case file is final and, based on the provisions of the Criminal Procedure Code of Kosovo, no appeal shall be permitted against it. The Court also notes that the challenged Decision was rendered on 20 January 2014, and the Applicant filed his Referral with the Court on 19 February 2014.
  34. The Court also takes into account Rule 36 of the Rules of Procedure, which provides that:
    - (1) *“The Court may only deal with Referrals 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:
      - (a) the Referral is not prima facie justified”.*
35. In his Referral, the Applicant alleges that the Pre-trial Judge and the Prosecution violated their obligations arising from Article 5 [Right to Liberty and Security] and Article 6 [Right to a Fair Trial] of the ECHR. In this regard, the Applicant alleges the violation of the principle of equality of arms, because he was not granted full access to the case file of the Prosecution.
36. The Court notes that the Prosecution and the Pre-trial Judge regarding proceedings on access to case file reasoned their Decisions referring to the provisions of the Law in force. In this regard, the Court finds that what the Applicant raises is a question of legality and not of constitutionality.
37. In this regard, 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 Supreme Court, unless and in so far as it may have infringed rights and freedoms protected by the Constitution (constitutionality).



38. The Constitutional Court cannot substitute the role of the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. (See, *mutatis mutandis*, Garcia Ruiz vs. Spain, No. 30544/96, ECtHR, Judgment of 21 January 1999; see also case KI70/11 of the Applicants Faik Hima, Magbule Hima and Bestar Hima, Resolution on Inadmissibility of 16 December 2011).
39. Furthermore, the Court notes that the reasoning given in the Decision of the Pre-trial Judge to reject the Applicant's request for access to the whole case file is clear and after having reviewed all the proceedings, the Court has also found that the proceedings before the Pre-trial Judge have not been unfair or arbitrary (See, *mutatis mutandis*, Shub vs. Lithuania, no. 17064/06, ECtHR, Decision of 30 June 2009).
40. In this relation, the Court wishes to refer to the meaning of the criminal charge, developed by the ECHR case law, which established that "*it is the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence or some other act which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect.*" (See Corgliano v. Italy, App. No. 8309/78, ECtHR, Judgment of 10 December 1982, par. 34).
41. The Court notes that the investigation procedure is still ongoing and an indictment has not yet been issued.
42. In this context, the Court cannot follow the Applicant's argument in relation to Article 6 and therefore the Court considers that, based on the circumstances of the Referral and stage of the proceedings, Article 6 of the ECHR is not applicable as argued by the Applicant.
43. Furthermore, based on the case file, it appears that the Applicant had not submitted a request to the Pre-trial Judge to determine the lawfulness of the detention, nor is he specifically requesting the Constitutional Court to challenge the detention on remand. Hence, Article 5 of the ECHR is not applicable as it concerns the detention issue, which has not been challenged by the Applicant.
44. Thus, the Court considers that the proceedings requesting access to the prosecution file that the Applicant is challenging do not come within the scope of either Article 5 or Article 6 of the ECHR and, therefore, the claim is manifestly ill-founded.
45. Based on the above-mentioned reasoning and referring to the current stage of the proceedings, whereby the investigation procedure is still ongoing and an indictment has not yet been issued, the Court considers that the Applicant's Referral is *prima facie* not justified.
46. Thus, the Court concludes that the Referral is inadmissible.

## Request for Interim Measure

47. The Applicant also requires from the Court to impose an interim measure, namely oblige the Pre-trial Judge to order the Prosecution to grant the Applicant full access to the parts of the case files.
48. In this regard, the Applicant holds that: *“This is necessary and appropriate, because the refusal to give access – as it is now – the defense is unable to check whether the conditions for the ordering of detention on remand are fulfilled and whether detention is lawful here.”*
49. In order for the Court to allow an interim measure, in accordance with Rule 55 (4) of the Rules of Procedure, it needs to determine 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.*
- (...)
- If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application”.*
50. As concluded above, the Referral is inadmissible and, therefore, there is no *prima facie* case for imposing an interim measure. For these reasons, the request for an interim measure is manifestly ill-founded.

## FOR THESE REASONS

The Constitutional Court, pursuant to Article 27 of the Law, and Rules 36 (2), a) and 55 (4) of the Rules of Procedure, on 12 March 2014, unanimously:

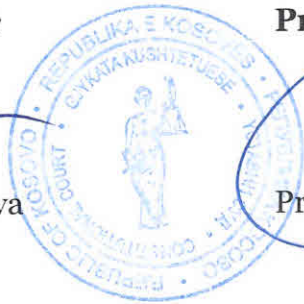
### DECIDES

- I. TO DECLARE 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**



Snezhana Botusharova



**President of the Constitutional Court**



Prof. Dr. Enver Hasani