Municipal Court of Prizren
P no. 1023/10
18 March 2011

IN THE NAME OF THE PEOPLE

THE MUNICIPAL COURT OF PRIZREN

EULEX Judge Witold Jakimko as Presiding Judge,

assisted by
Eriona Bitri Brading, Vlora Johnston, Valentina Gashi, Sonila MacNeil, Tarik Mripa as Court recorders,

in the criminal case against

the Defendant R.K born on in Municipality of on of and (nee), current address , Kosovar Albanian, Identification number married, father of two children, completed education, of good financial situation, no previous convictions,

charged as
per in the Summary Indictment filed by the District Public Prosecutor in Prizren dated 18 May 2007 with the criminal offence of Infringing the inviolability of residences under Article 166 (1) of the Provisional Criminal Code of Kosovo,

as described below
after the eviction at "Jusuf Gervalla" (ex "Bulevardi i Skenderbegut") no 67 in Prizren by Prizren Enforcement Unit performed upon written the request from the owner on 4th April 2006 some days later on R.K occupied the premises of A.T etween the 4th April and 15 June 2006, re-entering them illegally

Wherewith he committed the criminal offence of infringing the inviolability of residences under Article 166 (1) of the Provisional Criminal Code of Kosovo

having held the trial sessions
on 06 December 2010, 17, 18 January, 1 February and 15 March 2011, which the Municipal Public Prosecutor was represented by Idain Smajli, the Defendant and his Counsel Myrvete Qollaku,

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issues the following:

JUDGMENT

1.The defendant I R. K **is found guilty** because after the eviction at "Jusuf Gervalla" (ex "Bulevardi i Skenderbegut") no 67 in Prizren by Prizren Enforcement Unit performed upon written the request from the owner on 4th April 2006, some days later on, between the 4th April and 15 June 2006, he occupied the premises of A.T re-entering them illegally, thus he committed a criminal offence of Infringing the inviolability of residences under Article 166 (1) of the Criminal Code of Kosovo, this Court sentences him to a term of imprisonment of six (6) months,

2. Pursuant to Article 102 par.1 of the Kosovo Code of Criminal Procedure (hereinafter "the KCCP") the defendant shall pay the costs of criminal proceedings;

3. Pursuant to article 391 par.1 subparagraph 5 of KCCP this Court includes the time spent in detention during the period from 18 July 2006 until 18 August 2006.

4. Pursuant to Article 391 par.1 subparagraph 6 of the KCCP Court decides that the final Judgment may be announced in the press, radio or television.

REASONING

I. Procedural Background

1. Proceedings in Case P. No. 783/06

On 5 July 2006, the Public Prosecutor filed Indictment PP. 1208/06 indicting the Defendant for two counts of Removing or Damaging Official Stamps and Marks, contrary to Article 322 paragraph 1 of the PCCK, and Obstructing Official Persons in Performing Official Duties, contrary to Article 316 Paragraphs 1 and 2 of the PCCK. The case was registered in the Municipal Court in Prizren with reference number P. 783/06.

On 18 July 2006 detention on remand was imposed against the Defendant for a period of one month.

On 24 December 2008, during a hearing, deciding on the Summary-indictment, the Court issued a judgment rejecting the charges under Article 316 paragraph 2 and 322 paragraph

1 of the [Provisional] Criminal Code of Kosovo (hereunder referred to as PCCK). The decision on rejection has not been appealed and became legally final.

2. Proceedings in Case P. 950/07

On 23 February 2007, the International Public Prosecutor filed Indictment dated 31 August 2006 (without a reference number) to the Municipal Court in Prizren. By this Indictment the Defendant was charged with three offenses:

- Obstructing Official Persons in Performing Official Duties, contrary to Article 316 Paragraphs 1 and 2 of the PCCK;
- Infringing the Inviolability of Residences, contrary to Article 166 Paragraph 1 of the PCCK;
- Removing or Damaging Official Stamps or Marks, contrary to Article 322 paragraph 1 of the PCCK.

On 20 March 2007, the Confirmation Judge returned the Indictment of 31 August 2006 asking the Prosecutor to correct a few deficiencies in the Indictment.

Therefore, on 18 May 2007, the International Public Prosecutor filed the corrected Indictment (PP. 1208/06) containing the same charges. The case was registered by the Court with the reference number P. 950/07.

On 22 May 2008, the trial presided by a Kosovo Judge was held for the charge under Article 316 Paragraph 1 of the PCCK. V and N.T attended the hearing as injured parties. The trial was suspended.

On 3 March 2009 pursuant to a request filed by the EULEX Prosecutor after the hearing relating to case 950/07 against the defendant R.K for the criminal offense of infringing inviolability of residencies (art. 166 of PCCK) was assigned to EULEX Judge.

Only the charge of the above mentioned offense was a subject of EULEX decision on selection. In the decision on taking-over it is raised that the occupancy of the house came as a result of the mere fact that the injured parties were Serbs and their house was vacant. The second reason is that in the same time for the same factual situation there were two different files open - one of the local Prosecutor and one International Prosecutor. It was mentioned that these two files had not been merged and therefore had caused a miscarriage of justice

On 16 July 2009 the Court of first instance during the first trial found the Defendant guilty of the criminal offense under Article 166 (1) of the PCCK and sentenced him to imprisonment for e term of 6 months.

On 11 August 2009 the defense counsel filed an appeal against the Judgment to the Municipal Court in Prizren, P. 950/07. On 20 September the injured party D.T filed an appeal against the Judgment of the Municipal Court. On 16 October 2009 the Office of the District Public Prosecutor informed in writing that they do not find it reasonable to file a submission pursuant to Article 409 of the PCCK.

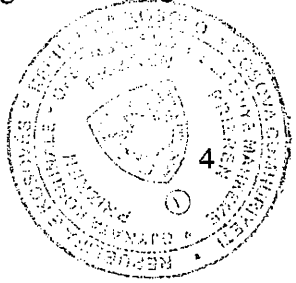
On 24 August 2010 the 2nd instance Court issued the ruling in which the 1st instance was annulled and the case was sent back for retrial. The ruling was issued in the name of people and decided on the appeal of the injured party that it "did not fall into the subject matter of the case".

While examining the case for the 2nd time on 06 December 2010, 17, 18 January, 1 February and 15 March 2011 the Court had hearings in which the Municipal Public Prosecutor was represented by Idain Smajli, with attendance of the Defendant and his Counsel Myrvete Qollaku.

II. Composition of the Court and scope of hearing.

1. According to Article 459 §1 and § 4 of KCCP during retrial the Court in rendering a new decision shall be bound by Article 417 of KCCP. During the 1st trial in the 1st instance the judgment of the first instance Court, in the part in which it was not appealed by the Municipal Prosecution Office, became final. There was no appeal of MPO while the one filed by the Injured Party should have been rejected because according to the Article 399 §3 of KCCP an injured party may challenge a judgment only with respect to the Court's decision on the punitive sanctions for criminal offenses committed against life or body, against sexual integrity or against the security of public traffic and on the costs of criminal proceedings.

2. The incriminated offence is only punishable by fine or by imprisonment of up to three years and so they shall be considered by an individual judge. According to



Article 22 § 3 of the KCCP criminal offence punishable by imprisonment of up to three years shall be considered by an individual judge of the municipal Court.

3. On 24 December 2008, during a hearing, deciding in the case with a reference number 783/06 the Court composed with one local judge issued a judgment rejecting the charges under Article 316 paragraph 2 and 322 paragraph 1 of the [Provisional] Criminal Code of Kosovo (hereunder referred to as PCCK). The decision on rejection has not been appealed and became legally final. The rule of *res iudicata* has its application to the charges under Article 316 §2 and 322 §1 of PCCK although the Court is not allowed to decide upon because only the charge of the offense provided by the Article 166§1 of KCCP was taken over to EULEX jurisdiction in the present case (lack of EULEX jurisdiction).

4. The member of the main trial panel in the case nr 950/07 before the selection to EULEX was a local judge who became then a 2nd instance judge in the panel consisted of two local judges and one international , ref nr. KP 171/10. The issue was raised by the local prosecutor on 6th December 2010 pretrial conference p.2.

5. The defense counsel filed the motion on termination of the criminal procedure because the injured abandoned prosecution according to the article 326 §2 of KCCP. (first time, see the minutes of 18 January 2011 p.3) This request was rejected as ungrounded; predominantly because the indictment had been filed by the Public Prosecutor and on this issue there was neither explicit nor *de facto* stand made by the injured party during the trial.

6. V.T confirmed that her property claim had been realized and that she made no property claim in these proceedings.

III. Administered evidence.

1. During the trial sessions following witnesses gave their testimony:

a. A.Sh. on 1st February 2011 (re-trial) and on 17th June 2009.

b. S.Gj on 1st February 2011 (re-trial) and 3rd July 2009.

c. R.Ç on 1st February 2011 (re-trial).

d. T.Z on 18th January 2011 (re-trial) and on 8th June 2009.

e. M.M on 18th January 2011 (re-trial) and on 8th June 2009.

2. The defense counsel Myrvette Qolaku has withdrawn from the request to hear the witness J.M (see the minutes of the pretrial conference held on 6th December 2010, p.4.).

3. The Prosecutor has withdrawn from the request of hearing A.T - (see the minutes of the pretrial conference held on 6th December 2010, p.4.).

4. The Defendant was heard on 15th March 2011 (personal data on page 4 of the minutes of 18 January 2011).

5. The Court admitted as evidence the following documents and the statements of the following witnesses that were read out or were considered as read out during the main trial according to the Article 368 para 3 of the KCCP:

i) Exhibit P1 – a document on possession from 2003 regarding parcel 7153/10.

ii) Exhibit P2 – Memo of HPD from 4 Apr 2006

iii) Exhibit P3 – HPD Memo dated 12 June 2006

iv) Exhibit P4 – HPD Memo dated 15 June 2006

v) Exhibit P5 – Eviction warrant dated 6 March 2006.

vi) Exhibit P6 – Memo dated 26 Apr 2006.

vii) Exhibit P7 – A record of Officer M

viii) Exhibit P8 – Housing tax record for the period 2002-07

ix) Exhibit P9 – Pre- contract signed by the defendant.

x) Exhibit P10 – Memo of HPD dated 6 June 2006

xi) Exhibit P11 – Possession list from 19 Oct 1999

xii) Exhibit P12 – Minutes of the hearing dated 27 Sep 2007

xiii) Exhibit P13 - Certificate of 3 Apr 2006 of the Cadastral office, mentioned on the minutes 17 June 2009.

xiv) Exhibit P14 – Key Hand over protocol, mentioned on the minutes of 17 June 2009.

xv) Exhibit P15 – the statements of S.C given on the 29th June 2009 during the first trial (page 12, minutes of 1st February 2011)

xvi) Statement of the witness V.T statement in the record of 17 June 2009 from page 12 until 20.

6. The proposal to hear D , V.T and N.T in the capacity of witnesses was rejected with reasoning included to the minutes of 1st February 2011 p.15-16. The prosecutor did not provide the Court with clear thesis of his motion. The motion of the Public Prosecutor could have prolonged the procedure and bearing in mind the charge of the indictment (art.166 of PCCK) taking such evidence is unnecessary particularly that the proposed witnesses were not at the scene of crime that time (*arg. ex* art. 152 §3 subpara 1 nad 4). Moreover the parties agreed on reading out the previous statements of V.T . It has to be stressed that the parties saw no need for hearing D and N.T during the first trial at the 1st instance.

7. The evidence which influences on Court's findings has been explicitly analyzed in subsequent paragraphs. Other evidence had no impact on the final content of the enacting clause.

IV. Factual and legal findings.

IV.A. Factual state.

1.The Defendant, after the eviction at "Jusuf Gervalla" (ex "Bulevardi i Skenderbegut") no 67 in Prizren by Prizren Enforcement Unit performed upon written the request from the owner on 4th April 2006, some days later on, between the 4th April and 15 June 2006, he occupied the premises of A.T , re-entering them illegally after the first eviction. Of course the Defendant was finally successfully evicted from the premises which he failed to leave after his re-entrance to them. The authorized person who demanded him to leave was international HPD officer T.Z . The Defendant averred he ceased occupation of the property on 4 April 2006 and that he did not reside or return at/to the premises on the dates in issue. There was no dispute between the Parties that the premises, the subject of these proceedings was, at all substantive times, the property of A.T The HPD and their employees T.Z v and M.D were "*authorized persons*" within the meaning of Article 166 (1) of the CCK. HPD was responsible for enforcing an Eviction Warrant dated 6 March 2006. There was no dispute that this Warrant concerned the premises in issue.

2. Mr. Z on 4 April 2006 attended the premises in order to enforce the eviction of the then occupant. This was the second eviction from the premises. The seals affixed by the HPD to the entry doors of the premises following the previous eviction had been removed or damaged and the door locks had been changed. Mr. Z met the Defendant outside the front door within the premises. The premises were "partially vacated" in the sense the Defendant had removed from the house all items that belonged to him. The Defendant was cooperative and did not object to the resealing of the entry doors.

3. On 26 April 2006 the Defendants brother N. K , his family and the Defendants family were found in occupation of the premises and evicted.

4. On 28 April 2006 V. and N. T went to the offices of the HPD in Prizren to collect the keys of the premises. When they approached the door the Defendant opened the gate and told them to come in. The Defendant was standing in the yard of the premises.

5. On 29 April 2006 Mrs T. reported to police the fact of the Defendants continuing occupation. Mrs T. stated that the front door of the domestic part of the premises was open and the Defendants brother was sitting on the steps leading to the front door. V. T told the Defendant to leave the premises. She informed him that she wanted to lock the house and to return there to live. He offered to buy the premises.

6. On 6 June 2006 M. D , another employee of the HPD, attended the premises whereupon he met the Defendant. The Defendant stated that he had reached an agreement with the owners of the premises.

7. On 12 June 2006 Mr. Z again went to the premises to enforce a third eviction. The locks that had been changed on 4 April 2006 had been broken and the seals damaged or destroyed. The HPD team discovered that some items that had been present in the domestic part of the premises prior to their sealing the premises on the previous occasion had been removed. Some miscellaneous items had been left in the basement of the domestic part of the premises. The commercial premises had been re-occupied. The Defendant met the HPD officials at the stairs to the residential premises, inside the

premises. The Defendant was aggressive and threatening. The Defendant verbally abused the eviction team and gestured to pull out his gun.

8. On 15 June 2006 Mr. Z again attended the premises. Upon his arrival he discovered the locks had not been interfered with. The premises were re-sealed. The premises were unoccupied at that time. On that occasion the Defendant again appeared, this time with his brother. The Defendant made verbal threats to the eviction team and pulled-out his gun.

9. There was no dispute between the Parties that during the period April – June 2006 there were negotiations between the Defendant and the T family regarding the purchase by the Defendant of the premises in issue. However, those negotiations collapsed before any agreement could be reached. At no stage during those negotiations did the T family give the Defendant permission to reside in the premises nor did they acquiesce in his residing there.

IV.B. Individual analysis of the evidence.

1. The term "*premises*" has to be considered according to its legal meaning according to the article 166§1 CCK. *The premises* which were the subject of the amended Summary Indictment P. 950/07 comprised two parcels of land registered in the Cadastral Office of the Prizren Municipality under numbers 7153/10 and 7153/13, respectively, in the Ownership register number 10592. As the evidence there is an extract dated 2003-06-09 of the Possession List of the Kosovo Cadastral Agency. The List records that A.C.T was, as of the date thereof, the registered owner of parcel 7153/10. *The premises* in question are located at Jusuf Gervalla street, number 67. When the Prosecution opened its case it stated that the only premises the subject of these criminal proceedings comprised parcel 7153/10. Those *premises* were, at all material times, the property of A.T

2. Parcel 7153/10 was the subject of an Eviction Warrant issued by the Housing and Property Claims Commission of the Housing and Property Directorate (hereinafter "HPD"). The Housing and Property Directorate and Housing and Property Claims Commission (HPD and HPCC) were established by United Nations Interim

Administration Mission in Kosovo (UNMIK) regulations as an interim measure to restore property rights, resolve long standing claims and uphold the rule of law. With the Rules and Procedures Regulation passed by UNMIK on 13 October 2000, the Housing and Property Claims Commission was mandated to adjudicate cases which are presented to it.

3. The witness T.Z was formerly employed as a Team Leader of the Housing and Property Claims Commission of the Housing and Property Directorate. He was responsible for the enforcement of Eviction Warrant. Mr. Z is currently employed by the Kosovo Property Agency.

4. The witness T.Z stated that his office was responsible for enforcing the Eviction Warrant numbered W/2006/3779/HPCC dated 6 March 2006 in Claims Numbered DS600714 and DS600719. He testified this Warrant concerned, inter alia, premises the property of A.T *The premises* comprised both *residential and commercial premises.*

5. Mr. Z confirmed that on 4 April 2006 he attended the premises in order to effect the eviction of the occupant. Defendant outside the front door to the premises. With regard the residential premises, he described some procedural disagreements regarding what property belonged to the injured party and what property belonged to the defendant. The defendant identified those items that did not belong to the injured party and those items were removed. The defendant confirmed that he had removed from the house all items that belonged to him. However, some items remained and it was unclear whether, in fact, those items belonged to the injured party. The defendant was cooperative and did not object to the resealing of the entry doors.

6.. On 12 June 2006 Mr. Z again went to the premises in order to enforce a third eviction. He stated that this eviction was the result of information received from D.T that the defendant had re-occupied the premises. Upon his arrival he noticed the locks they had changed on 4 April 2006 had been broken and the seals damaged or destroyed. The HPD team discovered that some items that had been present in the domestic part of the *premises* prior to their sealing the premises on their last visit had been removed. Some miscellaneous items had been left in the basement of the domestic part of the premises. The commercial *premises* had been re-occupied. The defendant strongly opposed the action of Habitat. In his Memorandum dated 12 June 2006 the

witness Z. stated the defendant physically protested the re-eviction, verbally abused EU team and tried to pull out his gun. He confirmed this version during he hearing. Referring to the *residential premises*, Mr. Z testified that, although the door to the basement was open and he saw certain miscellaneous items. The domestic part of the premises looked non-used and preserved in the status it had been left. However, in his later testimony he described larger items such as televisions and fridges being missing. The commercial part of the *premises* had been re-occupied.

7. On 15 June 2006 Mr. Z again attended the premises. Upon his arrival he discovered the locks had not been interfered with. The premises were re-sealed. The premises were unoccupied at that time. In his Memorandum dated 15 June 2006 Mr. Z stated that during their visit the Defendant appeared with his brother. The defendant made verbal threats to the eviction team, pulling-out his gun.

8. Mr. Z was asked by the Prosecution about the Memorandum dated 26 April 2006 that had been written by his colleague M.D. Mr. Z confirmed the Defendants brother N K and his family were found in occupation of the premises. They were evicted and their property removed.

9. The Memorandum dated 26 April 2006 states that the defendant tried to argue and convince Eviction Unit that they were negotiating to buy the properties with the claimant through some agency but his explanations were refused. Mr. Z testified that he had discussed this issue with Mr. D. During that visit the HPD was not shown any contract, pre-contract or, indeed, any document evidencing such negotiation or agreement by which the Defendant was permitted by the owner to remain in occupation.

10. In his evidence Mr. Z stated that he never met any member of the T family nor did he speak with them by telephone. He also confirmed that he has never met the Defendant other than while in attendance at the premises.

11. The Court found Mr. Z to be an honest and reliable witness and fully accepted his testimony.

12. The Memorandum of the HPD which put in evidence by the Prosecution dated 6 June 2006 refers to a discussion at the premises between Mr. D and *"the Respondent"*. Reference to *"the Respondent"* is clearly a reference to the Defendant. In the Memorandum of 26 April 2006 Mr. D. refers to N. K as *the brother of*

the Respondent". During that conversation the defendant stated that he had reached an "agreement" with the injured party. The Eviction Unit called the claimant and he confirmed but asked to execute the eviction without taking the respondents items out of the house including the ones from the shop.

13. The Court administered as the evidence a draft contract for the transfer of parcel 7153/10 signed only by the Defendant and the Property Tax Bill for 2002, 2003, 2004, 2005, 2006 and 2007, no 2594387. The Court ascertained as follows: the defendant's name appears on the Bill. The property to which the Bill is addressed is 67 Jusuf Gervalla Street. In fact, the property to which this Bill is addressed comprises parcels 7153/10 and 7153/13. The contract for the transfer of parcel 7153/10 dated 12 November 2008 refers to 67 Bulevardi Skenderbeu. There was no dispute 67 Bulevardi Skenderbeu and 68 Jusuf Gervalla is the same premises.

14.. By letter dated 28 May 2009 the Court received from the Cadastral and Geodesic Directorate in Prizren copies of a Ruling dated 2 October 2008 and the Contract on the Sale of Real Estate dated 12 November 2008. These documents confirm the lawful transfer of that parcel numbered 7153/10, comprising the premises the subject of these proceedings to M.L (K). Mrs T confirmed that the premises owned by her late husband comprised a house and two commercial premises. She testified that the Defendant was only in occupation of that property formerly owned by A.T

15. V.T was an honest and credible witness. The second instance Court did not raise any reservation as to the hearing of this witness during the first trial. During the first trial V.T testified and parties agreed on reading out her statements during the second trial. V.T is the widow of A.T and the injured party. A.T died on 28 May 2008. V.T confirmed that her property claim had been realized and that, in the circumstances, she made no property claim in these proceedings.

16. V.T testified that on 28 April 2006 she and N.T went to the offices of the HPD in Prizren to collect the keys of the premises. Referring to the property of A.T, she testified that when they approached the door the defendant opened the gate and told them to come in. Mrs T. testified that the

Defendant was standing "in the yard" of the premises. In her testimony given on 27 September 2007, referring to the meeting on 28 April 2006, V.T stated that she had spoken with the defendant about the house and the conversation was about him vacating the house and no longer living there. She told the Defendant not to come to the house anymore, as she wanted to lock it and then come back to it herself.

17. On 29 April 2006 Mrs T. reported to police the fact of the defendant's continuing occupation Mrs T stated that the front door of the domestic part of the premises was open and the Defendants brother, who was sitting on the steps leading to the front door, stated that she *should be happy they had agreed to talk to her.* V.T told the Defendant to leave the premises. He apparently offered to buy the premises.

18. In her statement to police on 29 April 2006 Mrs T stated that they would negotiate but that, in the meantime, he should leave. She told him that upon conclusion of the purchase he would receive the keys. When she testified in September 2007 V.T stated that, during their meeting on 28 April 2006, the defendant said he had nowhere to go and that if he was not inside the house he would set up a tent in the yard. Then he said that if her son D. did not come to talk there would be a "second Stimje". Mrs T understood this to be reference to a village of that name where Serb returnees had been murdered. In her testimony Mrs T stated that D.T acceded to this request and permitted the Defendant to remain in the premises for 10 – 15 days. She said this was for "*humanitarian reasons*".

19. V.T testified on 27 September 2007 that on 28 April 2006 the door of the premises was not locked and the Defendant had access to the premises. The following day she returned to the premises. The door was unlocked. She saw one couch and described the house as "demolished". V.T stated the Defendant offered her 80,000 Euro's for the premises. She was unaware of an offer of 300,000 Euro's. In her testimony V.T referred to other negotiations to sell the premises and the fact that an agent, R.D , was looking for other buyers. She stated other buyers were put off by the defendant who stated that he had already purchased the premises. V.T testified that she was not present when D.T spoke by telephone with A.Sh.

20. The following witness, officer M.M is in the service of the Kosovo Police Service for 9 years. Officer M wrote a Report on 15 June 2006 following his attendance at the premises. In his testimony Officer M stated that on the day in question he attended the premises. His role was to support the HPD officers who were effecting the eviction of an unlawful occupant. He testified that the defendant and two or three other persons arrived some time thereafter. Officer M testified that he met the defendant at the stairs to the property where the defendant remained in conversation with the officer for some 10 – 15 minutes. Officer M described the defendant as "nervous". According to the witness' statement here was no physical assault taking place there. The defendant did not block Eviction Unit. However finally the defendant pulled out the gun and raised it up, about 3-4 seconds pointing it to the air and saying that if this problem was not solved in a proper way, it was be possible someone would carry the consequences. Subsequently he put in back again under his black suit.

22. The statement of officer M had no direct implication to factual findings regarding whether the Defendant had occupied the premises of A.T , re-entering them illegally although it gives a very important background of the attitude of the defendant. The witness described the behavior of the defendant at place. The witness was Serbian speaking and admitted that he was not able to follow the whole discussion.

23. The following witness was A.Sh who was the owner of Intel Service, a real estate agency in Prizren. Mr. Sh . testified that Intel Service was approached by the defendant regarding the purchase of the premises the subject of these criminal proceedings. On behalf of the defendant, Intel service instructed an intermediary, R.D , to contact the T family. The Defence put in evidence a Certificate dated 3 April 2006 signed by Mr. Sh that confirmed those instructions and the amount of the purchase price. The Certificate refers to parcel 7153/9. Mr. Sh explained there appeared to be a discrepancy between the parcels with the result that reference was made to an incorrect parcel. There was no dispute between the Parties that the parcels the subject of the Certificate were 7153/10 and 7153/13. Mr. Sh confirmed that he was present at the offices of the HPD on 4 April 2006 when the Defendant handed-over to the HPD the keys to the premises. Intel Service drew-up the Pre-Contract dated 29 April 2006 that was signed by the Defendant. Negotiations collapsed when no agreement could

be reached concerning the price. Mr. Sh . recalled one conversation with D.T He could not recall the exact date but thought it was approximately 10 days prior to the drafting of the Pre-Contract. The conversation lasted some 20 – 30 minutes. Mr. Sh testified that it was clear from their conversation that D.T knew the Defendant was in occupation of the premises. Mr. Sh. testified that the whole idea of the conversation was that the person occupying the property was the potential buyer. At no stage during their conversation did D.T refer to the Defendants status vis-à-vis his occupation. There was no conversation regarding the Defendant potentially renting the premises from the T family. Their conversation concerned the contract price, time-limits for the completion of the contract and the transfer of funds. Clearly no agreement could be reached concerning the purchase price and the transfer of funds with the result that, after several weeks, negotiations collapsed. There was no conversation regarding the defendant being given explicit permission to remain in the premises nor, apparently, any indication the T family agreed to the defendant remaining in occupation. The witness reported general circumstances and environment related to the negotiation process. However it is worth to be emphasized the witness' statement that the person occupying the property was the potential buyer. It means that the witness was aware about the occupation of the injured party's premises by the defendant what was in fact illegal.

24. The following witness was **Dr.** S.Gj . He gives his statement during the retrial, he stood for his previously given statements. The witness stated that they all knew that R.K had lived in the house for a while and he had lived also in witness' house because from the other one he was forcibly evicted. The statement means that this witness admits that the defendant was occupying the injured party's premises that time. The witness averred during the hearing on 1st February 2011 that he could not recall himself the content of his previous statements therefore the Presiding Judge read out Gj previous statement. The balcony of witness' house overlooked the garden of the premises in issue. The respective premises shared a common path. He stated that it would have been impossible for someone to enter or leave his neighbors' premises without him being aware. Dr. Gj . testified about a chance meeting he had with N.T . Referring to N.T , Dr. Gj testified that she went somewhere to

pick the keys up and was on her way to the house and he subsequently testified that they stated they went to the HPD to get the keys. He could not recall the precise date but from his testimony it was clear he was referring to 28 April 2006. Dr. Gj testified that during their conversation N.T requested a meeting with the defendant. N.T referred to certain "issues" regarding the premises. Dr. Gj agreed to act as intermediary and arrange the meeting. The meeting between N.T and the Defendant took place a few hours after their initial meeting. V.T was also present. The first contact between the parties was in Dr. Gj 's garden. Dr. Gj was present the whole time. He described the meeting as being initially amicable. He could not recall if anyone tried to open the gate to the yard of the premises in issue. Dr. Gj estified that the entrance gate to the premises had been sealed by the HPD. He testified that the gate was closed but he could not be sure that the HPD locks and seals were still intact at the time of the meeting. Dr. Gj referred to two "unpleasant scenes" when the HPD attended the T family home to enforce the evictions. The first such incident occurred prior to the meeting with N.T and V.T while the second occurred after their meeting. He was not present during either eviction. He recalled reference to a Bulgarian employee of the HPD being present. There can be no doubt that Dr. Gj was testifying about the period April – June 2006. Dr. Gj testified that he did not know why N.T and V.T decided not to go into the yard of their home despite the fact they had keys to the premises. He described the atmosphere between the parties deteriorating. He could not explain why. He was at pains to blame V.T for certain inflammatory language concerning the ownership of the premises. Dr. Gj estified that negotiations were ongoing between the Defendant and D.T regarding the formers purchase of the premises. Clearly those discussions were to some extent advanced because there was reference not only to the purchase price but the mode of payment. He referred to several telephone conversations between himself and D.T and N.T He was asked about damage to the locks and seals put on the entrance doors by the HPD. Dr. Gj testified that the doors and windows to the T house were open. He said "thieves" went into the house and stole things but he did not see him. However, he could not say what had been stolen. In fact, he testified that he had not even

gone into the house to see what, if anything, had been taken or even reported the matter to the police.

25. In his previous statement Dr. Gj categorically disputed the allegation that the defendant was in occupation of the T home, that the Defendant opened the gate or that he was in the yard. He confirmed the Defendants brother was present but in his garden and not in the yard of the T family. This contradicted the evidence of V.T . However, the Memorandum dated 26 April 2006 refers to the Defendants brother, his family and the Defendants family being found in occupation of the property on that date. They were evicted. Given that that eviction occurred only two days before the meeting between N.T , V.T and the defendant it was surprising Dr. Gj did not refer to the defendants brother having so recently been in occupation or the fact of his eviction. Indeed, when asked by the Court if he could recall the Respondents brother residing at the premises in 2006 Dr. Gj replied "No". This was surprising given that Dr. Gj had testified that their respective properties shared a common path and that his balcony looked into the garden of the premises. Referring to the meeting with N.T Dr. Gj was asked by the Defence Counsel where did the defendant come from. In reply, Dr. Gj testified that they lived for a long time on the first floor of his house and this lasted for three months. They were staying in his house since they were evicted from the house where they were living.

26. Referring to the premises, Dr. Gj was asked by the Court whether the Defendant was actually living there at that time. Dr. Gj replied that he was not. Dr. Gj testified that the Defendant was living in his house at that time. Dr. Gj testified that the Defendant and his family resided in his home for approximately three months since they were evicted from the house where they were living. This was a suitable period of the offense the Defendant was indicted with. This statement clearly contradicted evidence given by other witnesses. The Court found the evidence of Dr. Gj to be incoherent, as a result - untrustworthy and clearly contrived to assist the defendant.

27. The parties agreed on reading out the statement of S.C . Mrs C resides at 69 Suzi Celebi Street, Prizren. She testified that the Defendant resided at number 68 Suzi Celebi Street during the period April – June 2006. She thought the Defendant and his family arrived in early April. She described the defendants family as comprising his wife

and two boys. She stated that the reason she recalled the dates was that her house was undergoing renovation at the time. She recalled the defendant working in Pristina. She said she saw the Defendant "very often, not every day". Even where the Court to accept the testimony of S.C , that the defendant resided at 68 Suzi Celebi Street during the period April – June 2006 that does not support the defendants assertion that he did not also occupy or return to the premises the subject of these criminal proceedings. Nor does that undermine the Prosecution evidence given by T. 2 . She stated that the reason she recalled the dates was that her house was undergoing renovation at the time. Even were the Court to accept the testimony of S.C that the defendant resided at 68 Suzi Celebi Street during the period April – June 2006 that does not support the defendant's assertion that he did not also occupy or re-enter the premises in issue. Nor does that undermine the Prosecution evidence given by T. 2 . Indeed, it is possible to 'occupy' two or more properties at the same time. The defendant was charged with entering the said premises in an unlawful manner. Of course, being in occupation is an evidence supporting the substantive offence.

28. R.C resides at 69 Suzi Celebi Street, Prizren. He also stated on 1st February 2011 that R.K lived at that address throughout April, May and June. According to the witness the family of the defendant and himself were very quiet while leaving there.

29. The **defendant** testified and gave his version of the events. The Defendant averred he ceased occupation of the property on 4 April 2006 and that he did not reside neither return at/to the premises on the dates in issue. Perhaps the most compelling evidence is the Defendants own admission in the statement he gave to police on 28 June 2006 that he had been evicted twice by the HPD and that he had subsequently re-entered the premises on his own responsibility (see 2nd page on his statement made on 28th June 2006). Further, he admitted that he continued to reside in the premises. Saying that he acknowledged that he did purposely and full awareness of potential consequences.

30. He stated that he returned the keys to the HPD on 4 April 2006. He testified that he did not enter the property after 4 April 2006. Clearly that was untrue. The Defendant stated that he had been allocated the property in 1999 although it was not a decision rendered by UNMiK Administration. At that time the property had been abandoned and

was empty. The defendant put in evidence Minutes of the Geodetic and Cadastral Office of the Prizren Municipality under Number 01-466-144/2 dated 7 September 1999. Referring to the Memoranda of the HPD, the defendant said they were "lying". He described a conspiracy by the HPD to dispossess persons whom, he averred, were lawfully entitled to occupy property in circumstances such as his. Referring to the various HPD Memoranda put in evidence the defendant testified that the documents were "fabricated". He described the HPD officials as having "mean interests". The HPD Memorandum of 26 April 2006 referred to the defendants brother and the Defendants family being in occupation as of that date. The defendant testified that he did not know who was in occupation at that date. He testified that from 24 April to 15 June he and his family resided in Suzi Celebi Street. He testified that his brother and his brothers' family also resided in Suzi Celebi Street. It was not arguable that the defendant' brother N. K and his family also resided there. The Defendants evidence in this regard is simply untenable. In his own testimony the Defendant is unequivocal when, on 28 June 2006, he stated that he was "still" residing in the premises with his family members. During the interview the Defendant denied damaging the seals placed on the entrance doors by the HPD. The Defendant stated that he was evicted twice and he *entered the house once and re-returned.* The questions put to the Defendant during the interview were clear and precise and the answers he gave were unequivocal.

31. In the opinion of the Court the entirely grounded conclusion is that the line of defense taken by R. K was ambiguous, incoherent and contained internal contradictions. The administered evidence and the detailed description of all facts and circumstances lead the Court to the conclusion that the defendant committed the criminal offense as he was charged in the indictment.

IV.C. State of mind of the perpetrator.

1.The Defendant knew the property was the subject of an Eviction Warrant. The Defendant had, himself, been evicted from the premises. Indeed, he was present on four occasions between 4 April and 15 June 2006 when the HPD enforced the Warrant. He

had no lawful authority or justification for entering the premises after 4 April 2006. By reason thereof, the Defendant acted unlawfully when he subsequently entered the residence or closed premises. In the opinion of the chain of factual circumstance leads directly to R K as a perpetrator. Nobody else was interested in entering illegally to premises of the injured party. The fact that the defendant was interested in buying the disputable property is also out of any argue. In the minutes of 28th June 2006 he stated even himself that he was evicted twice and re-entered the arguable premises on his own decision. S.Gj did not notice any stranger roaming around in the neighborhood neither reported a theft nor burglary while he should have seen something, especially that he allegedly had the defendant staying in his house. The witnesses, particularly T.Z and M.M confirmed the presence of the defendant during evictions from 4th April until 15th June 2006. Even the defendant confirmed his presence although there were some slight differences (pulling out the gun) as to his behavior at place. During the trial there was no doubt that after the eviction on 4th April 2006 the defendant brother was found present in the business premises. He acted with an intent to commit the offense he was charged with..

2. The Defendant pleaded not guilty of the offense he was charged with. However the defendant's version is not grounded by the administered evidence. It has to be emphasized (already for the third time in this reasoning) that the defendant himself stated in the minutes of 28th June 2006 that he had been evicted twice and re-entered the arguable premises on his own decision. The natural legal consequence of his decision is the present judgment. In the opinion of the Court there is no doubt for the Court that the Defendant had committed the crime of Infringing the inviolability of residences under Article 166 (1) of the Criminal Code of Kosovo. After having been evicted the defendant re-entered the premises of the injured party. Moreover, in the opinion of the Court, it would be rather difficult to ground in the reasonable and trustworthy way the presence of the defendant during the evictions when he was not invited. Bearing in mind the whole factual background his presence cannot be treated as only a simple coincidence. The most probable motive of his action was to remain a possessor of the premises counting on some system changes or state impropriation in order to become a legal owner at least *per facta concludentia.*

IV.D. Applicable substantive law.

1. The crime of Infringing the inviolability of residences under Article 166 (1) of the Criminal Code of Kosovo in the date while committed was qualified under provisions of Provisional Criminal Code of Kosovo. Sentencing the Court applied the law currently in force which in fact does not deviate from the Provisional Criminal Code. There is no difference in the substantive content of it. After the eviction held on 4th April 2006 the defendant re-entered the premises. The natural consequence *de facto* of the defendant's action was that the premises were not effectively vacated according to the content of the Eviction Warrant being enforced by HPD. The article 166 (1) of the CCK does not require a direct proof that the defendant broke the seals or locks himself. The Court must be satisfied that the defendant acted unlawfully when he entered the residence or closed premises of another person or failed to leave those premises upon the request of an authorized person. In the present case the Court in satisfied that Z. K re-entered closed premises. The abovementioned action took place after the eviction of 4th April 2006. The authorized person to ask for eviction was V. T and the authorized person enforcing eviction was T. Z / who was acting on behalf of injured party (claimant in the civil execution case). The Court made a determination of the state of facts according to the evidence being in its disposal and according to the law.
2. In the criminal act of Infringing inviolability of residences, as per Article 166 (1) of the CCK, is finalized after the unlawful entrance in a residence or closed premises. The defendant has carried out all legal conditions and requirements provided by the law as per article 166 (1) of the CCK. The alternative option provided by the abovementioned provision (failing to leave such premises) usually is a natural consequence of the act which occurred first. It does not constitute a necessary precondition in this case.

IV.E. Personal circumstances of the Defendant.

1. *Previous life of offender.* Regarding this circumstance, before the commission of the criminal act the defendant had never broken the law.

2. *Offender's attitude upon committing the criminal act.* The offender's behavior as the accused in the course of the whole criminal proceeding was relatively proper. The offender during the trial was challenging but the Court treated it as a way of performance of his right to defense. These two arguments establish mitigating circumstances that have to be taken into consideration on calculating punishment.

IV.F. Calculation of the punishment.

1. The punishment of imprisonment calculated according to the content of the art.64 of CCK the above mentioned conditions and according to the purposes mentioned in the Article 34 of CCK, especially preventing the perpetrator from committing criminal offenses in the future and rehabilitating the perpetrator, has been established with a period of six (6) months as the most adequate, proportionate and accurate.

2. *Degree of criminal liability.* The intensity of acting of the offender was not on the level that requires a sanction more severe than the imprisonment of six month The degree of criminal liability of is average.

3. Incentives for which the act is committed. In the opinion of the Court the most probable motive of his action was to remain a possessor of the premises counting on some system changes or state impropriation in order to become a legal owner of the property at least *per facta concludentia.* According to the above the incentive as such was a material benefit which has to be assessed as base.

4. *Intensity of criminal danger or injury to the protected value.* The negative impact of this offense to the stability of ownership turnover relations and the position of the injured party (as a representative of ethnic minority) can make the Court to arrive at the conclusion of the degree of danger caused by such an act, especially from the point of view of the protected value, is relatively high. No party should benefit of another party's weaker position, especially in real-estate turnover and bearing in mind legal guarantees for ethnic minorities provided by the internal law as well as by the international law applicable in Kosovo.

5. The Court is satisfied that the sentence of imprisonment for six months is commensurate with the seriousness of the offence, taking into account the defendant's

previous good character and the committed offense. The other dimension of this judgment is to instruct the society that this kind of behavior is not being tolerated and it meets the appropriate reaction of Justice. It has to be also clearly emphasized that lack of jurisprudence related to the art.166 of CCK or its potential existence cannot prevail over the grammar wording of the CCK. The provision clearly states that the Court is allowed to impose the punishment up to 3 years and no jurisprudence can change the legal sentencing frames.

IV.G. Remaining elements of the verdict.

The Court included the time spent in imprisonment under earlier 1st instance sentence which was annulled by the Supreme Court judgment Pkl-Kzz 103/09 dated 22nd April 2010

For the reasons stated herein I hereby render this Judgment.

Dated this 18 day of March 2010

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Judge Witold Jakimko

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Court Recorder Tarik Mripa

<u>Notice of Appeal</u>: Any appeal against a Judgment rendered at first instance shall be filed within eight days of the date of service of the said Judgment, addressed to the District Court of Prizren through the Municipal Court of Prizren.