



The Federal Supreme Court (F S C) has been convened on 2.12.2018 headed by the Judge Madhat Al-Mahmood and membership of Judges Farouk Mohammed Al-sami, Jaafar Nasir Hussein, Akram Taha Mohammed, Akram Ahmed Baban, Mohammed Saib Al-Nagshabandi, Aboud Salih Al-Temimi , Michael Shamshon Qas Georges and Hussein Abbas Abu Al-Temmen who authorized in the name of the people to judge and they made the following decision:

The Plaintiff: (alif.feh.alif.mim) barrister.

The Defendant: the Speaker of the ICR/ being in this capacity – his agents the Director in the legal department of the ICR (sin.ta.yeh) and the assistant legal consultant (heh.mim.sin).

The Claim

The Plaintiff Barrister (alif.feh.alif.mim) claimed in the petition of his case that: 1. The Defendant (Speaker of the ICR) is continuing violates the Constitution in articles (37/1st/alif) (the liberty and dignity of man shall be protected) and article ((15)) (the law is sovereign. The people are the source of authority and legitimacy, which they shall exercise in a direct, general, secret ballot and through their constitutional institutions), and article (17/2nd) (the sanctity of the homes shall be protected. Homes may not be entered, searched, or violated, except by a judicial decision in accordance with the law), and article (16/5th). The plaintiff means (19/5th) of the constitution (the accused is innocent until proven guilty in a fair legal trial. The accused may not be tried for the same crime for a second time after acquittal unless new evidence is produced) and article (19/13th) (the preliminary investigative documents shall be submitted to the competent judge

in a period not to exceed twenty-four hours from the time of the arrest of the accused, which may be extended only once and for the same period). Violating of (ICR's Speaker) to abovementioned articles is achieved by examining magistrates in all investigation, penalty, criminal and violation cases which hindering challenges the decisions that touches the liberty and freedoms of the people, or presenting an evidences about acquittal of the accused in the cases which requires to produce these facts in a way that correspond to the constitution and law. The searching and detecting or verifying of these clues which hinders the Judiciary from looking for it, because its decisions are immunized and this will be faraway of Human rights, Constitution articles, Law sovereignty and International protocols, which has the topmost of implementing in Human rights field and innocent accused citizen. 2. The Constitutional Countries can't immunize itself and its decisions in the criminal cases, except what related to Civil or Human rights from being challenged. The procedural Laws which draws the case's path, as what related to rights and Constitutional freedoms which is it the most important rights of the community (as individual) even if he was complainant or accused. Whereas criminal procedure Law No. (23) for 1971 (amended) stipulates in article (249/beh) (the mistake must not be regarded if it was not aggrieving the accused defense) and these are one of the most important guarantees of the accused during investigation which exceeds the Judiciary competence in some cases of arresting and searching, then allows it. 3. Clause (jim) of article (249) of criminal procedure law stipulates on (challenge can't be accepted as appealing separately in the decisions issued in competence matters, also in preparatory and administrative decisions. Any other decision regarded not decisive in the case unless it will produce hindering the case's process. Arresting, custody and releasing by bill or without must be excepted). Whereas the Higher Judicial Council with its authority issues an administrative decisions which considered an individual decisions does not submit to publishing in the gazette, neither to be scrutinized by the ICR nor the criminal Court with its appealing entity. Also it can't be scrutinized by cassation Court with its basic competence which may cuffing the rights of the accused and the complainant. These decisions grant or

allows the examining magistrate to accept or reject a requests presented to him by the agent of accused or the complainant in many cases. This matter will lead to cuffing the accused rights or the complainant because these decisions will not subject to monitory, scrutiny or appeal from a higher body directly, and this will not achieve justice, especially that the examining magistrate is a referral Judge not a subject Judge which may authorize him to discuss or examining the clues, and this matter may cause not to achieve justice. In this case it is required as shown above to annul provisions of clauses (beh,jim) of article (249) of criminal procedure law No. 23 for 1971 (amended) to make the freedom of collecting these information and allows to deepen these procedure available and not violates the authority of hold in article (249/alif) text of criminal procedure which has not source to be implemented and had been rejected as well as restricting by the text of clauses (beh) and (jim) of abovementioned law. Accordingly, the plaintiff requested to ((judge by annulling clause (beh) and clause (jim) of article (249) of criminal procedure law No. (23) for 1971 (amended) because of unconstitutionality, and it also violates the litigation rights and cuffing the accused rights and liberty, and it will let the Judiciary issues an individual decisions. The agents of the Defendant the Speaker of the ICR/ being in this capacity answered the petition of the case as following: the legislator had restricted the procedures where mistake is negligible with those which is not aggrieving the accused defense to not hindering the investigation because of continuous challenging in procedures, so the flow of investigation is what the legislator meant when he listed it in item (beh) of article (249) of criminal procedure law abovementioned. The legislator did not allows challenging appealingly in an individual way in the decisions which issued in competence matters. As well as in the preliminary and administrative decisions or any other decision not determinate in the case (mim249/jim) whereas this matter is required to guarantees Judicial procedures flow. This restriction is limited on the cases which is not producing a determining the case or to hinder its processing, even if arresting, custody and releasing with a bill or without. Claiming that the administrative decisions of the Higher Judicial Council are individual and immunized of being challenged

is not true, because this authority issued an administrative subject to be challenged before administrative Judiciary like the other authorities in the state. Therefore, there is no reason to challenge its decisions before cassation Court or the ICR, because these authorities are not concerned to tries in how legitimate the administrative decisions of the Higher Judicial Council are. The text of items (challenge subject) are Constitutional and guarantees the rights of accused and complainant, as well as it represent a legislative choice does not touches the rights which guaranteed by the Constitution. Accordingly, the agents of the defendant requested to reject the case, and to burden the plaintiff all Judicial expenses. The plaintiff presented an illustrative draft in the case dated on 1.28.2018, and he repeated what listed in the petition of his case and requested to judge according to it. After registering this case according to clause (3rd) of article (1) of the FSC's bylaw No. (1) for 2005, and after completing required procedures according to clause (2nd) of article (2) of aforementioned law. The day 2.12.2018 was set as a date to try the case, and on this day the Court had been convened. The plaintiff himself attended as a Barrister according to Bar Association identification card which he presented to the Court with authority (jim), and the identification card is valid until 12.31.2018. The Court reviewed it, and give it back to the Barrister. The agents of the Defendant the Speaker of the ICR/ being in this capacity attended, and the public in presence of both parties pleading proceeded. The agents of the Defendant answered that they repeat what listed in answering draft, and they requests to reject the case for the reasons listed in. The plaintiff presented an answering draft dated on 2.12.2018 he recited its summary publicly during the session. Later on, the plaintiff requested to recite the draft verbally, so, the Court allowed him to do that as a respect for defense right. The agents of the Defendant answered that they have no comment on what listed in this draft, and they are satisfied of what they mentioned in their answer of the case. Whereas nothing left to be said, the Court made the end of pleading clear and recited the decision publicly.

The Decision

After scrutiny and deliberation by the FSC, the Court found that the plaintiff is challenging clauses (beh) and (jim) of article (249) of criminal procedure law No. (23) for 1971 because aforementioned clauses violates articles (37/1st/alif) and (15) and (17/2nd) and (19/5th) of the Constitution. Whereas it inhibits challenging the decision which touches the rights and freedoms of citizens, or presenting an evidences to acquit the accused in the cases that needs to show these facts in a way correspond to the Constitution and the law. This matter will make the examining magistrate decisions immunized of being challenged before competent bodies in challenging, and the FSC finds that clauses (beh) and (jim) of article (249) of criminal procedure law No. (23) for 1971 which challenged because of unconstitutionality were enacted to ensure fastness of taking decision in the case, and to preclude the procrastination and stalling from some parties in the case. Abovementioned clauses are immunized of being challenged, and according to it a preliminary decisions may be issued during the case processing. The preliminary decision issued by examining magistrate according to it, is subjected to challenge with the determinate decision in the case before competent Court of challenge. Therefore, aforementioned clauses does not violates Constitutional articles provisions which mentioned by the plaintiff in the petition of the case, so the case of the plaintiff will lacks its legal substantiation. Based on that, the Court decided to reject it, and to burden the plaintiff the case's expenses and advocacy fees for agents of the Defendant/ being in this capacity the Director in the legal department of the ICR (sin.ta.yeh) and the assistant legal consultant (heh.mim.sin) amount of (one hundred thousand Iraqi dinars). The decision issued decisively and unanimously according to provisions of article (94) of the Constitution and article (5/2nd) of the FSC law No. (30) for 2005, and it was mad clear on 2.12.2018.