



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

File number: KSC-CC-2019-07

Before: **The Specialist Chamber of the Constitutional Court**
Judge Vidar Stensland, Presiding
Judge Roland Dekkers
Judge Antonio Balsamo

Registrar: Fidelma Donlon

Date: 13 January 2020

Language: English

File name: Referral by Driton Lajci to the Constitutional Court Panel on the Legality of the Interview Procedure by the Specialist Prosecutor's Office

Classification: Public

Decision on the Referral of Driton Lajci
Concerning Interview Procedure by the Specialist Prosecutor's Office

Applicant

Driton Lajci

Specialist Prosecutor

Jack Smith

The Specialist Chamber of the Constitutional Court

Composed of

Vidar Stensland, Presiding Judge

Roland Dekkers, Judge

Antonio Balsamo, Judge

Having deliberated both remotely and in person delivers the following Decision

I. PROCEDURE

1. On 14 November 2019, Mr Driton Lajci (the “Applicant”) lodged with the Specialist Chamber of the Constitutional Court a referral, dated 13 November 2019 (the “Referral”),¹ under Article 113(7) of the Constitution of the Republic of Kosovo (the “Constitution”). The Applicant is represented by Mr Toby Cadman.
2. On 15 November 2019, the President of the Specialist Chambers, pursuant to Article 33(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (the “Law”), assigned the above Panel to rule on the Referral.²
3. On 15 November 2019, the Specialist Prosecutor filed a request for reclassification of the Referral from public to confidential,³ pursuant to Rule 11 of the

¹ KSC-CC-2019-07, F00001, Referral to the Constitutional Court Panel on the legality of the interview procedure, public with confidential annexes, 13 November 2019 (the “Referral”).

² KSC-CC-2019-07, F00002, Decision to assign Judges to a Constitutional Court Panel, public, 15 November 2019. As regards the working language of these proceedings, see KSC-CC-2019-07, F00005, Decision on the working language, public, 18 January 2019. As regards the venue of these proceedings, see KSC-CC-2019-05, F00007, Decision on the location of proceedings before the Specialist Chamber of the Constitutional Court, public, 22 January 2019; KSC-CC-2019-06, F00001, Invocation of change of venue for referrals made pursuant to Article 49 of the Law, public, 18 January 2019.

³ KSC-CC-2019-07, F00003, Prosecution request for reclassification of filing KSC-CC-2019-07/F00001, confidential, 15 November 2019; KSC-CC-2019-07, F00003, RED, Public redacted version of ‘Prosecution request for reclassification of filing KSC-CC-2019-07/F00001’, dated 15 November 2019, public redacted, 18 November 2019.

Rules of Procedure for the Specialist Chamber of the Constitutional Court (the “Rules”). On 17 November 2019, the Applicant filed a response,⁴ asking the Panel to reject the reclassification request. On 20 November 2019, the Panel issued a summary decision,⁵ by which it rejected the reclassification request.

4. On 2 December 2019, the Specialist Prosecutor filed his response to the Referral.⁶ The Applicant⁷ and the Specialist Prosecutor⁸ filed their further submissions on 9 and 17 December 2019 respectively.

II. THE FACTS

5. On 25 September 2019, the Applicant received summons from the Specialist Prosecutor’s Office (SPO) requiring him to appear for questioning. The summons noted that there were grounds to believe that the Applicant had been involved in the commission of a criminal offence.⁹

6. On 13 October 2019, the Applicant requested the SPO to inform him of specific allegations against him and to disclose materials giving rise to those allegations. The next day, the SPO informed the Applicant under which provisions of the Criminal

⁴ KSC-CC-2019-07, F00007, Defence response to the prosecution request for reclassification of filing KSC-CC-2019-07/F00001, confidential, 15 November 2019.

⁵ KSC-CC-2019-07, F00007, Summary decision on the Prosecution Request to reclassify the filing KSC-CC-2019-07/F00001, public, 20 November 2019.

⁶ KSC-CC-2019-07, F00008, Prosecution response to Mr Driton Lajci’s Referral to the Constitutional Court Panel on the legality of the interview procedure, with confidential Annexes 1-3, public with confidential annexes, 2 December 2019 (the “SPO response”). In this connection, see KSC-CC-2019-07, F00006, Notice regarding replying submissions, public, 18 November 2019.

⁷ KSC-CC-2019-07, F00009, Defence reply to the Prosecution response to Mr Driton Lajci’s Referral to the Constitutional Court, public, 9 December 2019.

⁸ KSC-CC-2019-07, F00012, Prosecution response to filing KSC-CC-2019-07/F00009, public, 17 December 2019.

⁹ Referral, paras 2.2-2.4; SPO response, para. 2, its confidential Annex 1 (summons dated 25 September 2019).

Code of the Republic of Kosovo it was investigating the Applicant and refused to provide him with evidence in that regard.¹⁰

7. On 17 October 2019, the Applicant, accompanied by his Counsel, attended an interview to the SPO. As argued by the Applicant, his Counsel could not advise him properly since the details of the allegations against the Applicant had remained undisclosed. Hence, the Applicant exercised his right to remain silent.¹¹

III. ALLEGED VIOLATIONS

8. The Applicant complained that the SPO summons directing him, as a suspect, to submit himself for an interview and the interview procedure were unlawful and hence inadmissible. In particular, the SPO had not indicated a criminal offence the Applicant was suspected of having committed and had not disclosed evidence giving rise to that suspicion.¹²

9. In that regard, the Applicant invoked Article 6 of the European Convention on Human Rights (the "Convention").¹³ He also relied on Articles 19(2), 21(4)(a) and 38(3)(a) of the Law, and Rule 43(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers.¹⁴

IV. JURISDICTION

10. The Chamber observes that the Referral was filed under Article 113(7) of the Constitution. In the Referral, the Applicant complained about the SPO summons and interview procedure. The Referral thus relates to the Specialist Chambers and

¹⁰ Referral, paras 2.5-2.10; SPO response, para. 3, its confidential Annex 2 (email from the SPO to the Applicant's Counsel dated 14 October 2019).

¹¹ Referral, paras 2.13-2.15; SPO response, para. 31, its confidential Annex 3 (transcript of interview dated 17 October 2019).

¹² Referral, paras 1.2-1.3, 4.22.

¹³ Referral, paras 5.2-5.4.

¹⁴ Referral, paras 3.1-3.9, 5.1.

Specialist Prosecutor's Office, as required by Article 162(3) of the Constitution and Articles 3(1) and 49(2) of the Law. It follows that the Chamber has jurisdiction to rule on the Referral.

V. ADMISSIBILITY

A. THE SUBMISSIONS

11. The Specialist Prosecutor claimed that the Applicant had failed to exhaust all available effective remedies as required by Article 113(7) of the Constitution and Article 49(3) of the Law. In particular, the Applicant had not requested the President of the Specialist Chambers under Article 33(2) of the Law to assign a single judge to deal with the matter. Further, under Article 39(1), (3) and (10) of the Law and Rule 48(2) of the Rules of Procedure and Evidence, a judge could examine the issues raised in the Referral. In addition, the Applicant had not specified which constitutional provisions the SPO summons and interview procedure had violated, and he had raised matters falling outside the Chamber's jurisdiction.¹⁵

12. In reply, the Applicant disagreed with the arguments of the Specialist Prosecutor. In the Applicant's submission, the review by a single judge was not an effective remedy as the issues raised in the Referral fell outside the scope of that review.¹⁶

B. THE CHAMBER'S ASSESSMENT

1. Constitutional right at issue

13. First, the Chamber needs to determine which constitutional rights of the Applicant the Referral concerns. In this regard, the Chamber notes that the Applicant

¹⁵ SPO response, paras 8-16; KSC-CC-2019-07, F00012, Prosecution response to filing KSC-CC-2019-07/F00009, public, 17 December 2019, paras 2-3.

¹⁶ KSC-CC-2019-07, F00009, Defence reply to the Prosecution response to Mr Driton Lajci's Referral to the Constitutional Court, public, 9 December 2019, paras 8-16.

complained that the SPO, prior to the interview, had not informed him, as a suspect, of the details of the suspicion against him and had not provided him with evidence giving rise to that suspicion. In this respect, the Applicant relied on Article 6 of the Convention, which provides for the right to fair trial (see paragraph 9 above).

14. The Chamber observes that, by virtue of Article 22(2) of the Constitution, Article 6 of the Convention applies at the constitutional level.¹⁷ The right to fair trial is also set out in Article 31 of the Constitution. In so far as the Applicant complained in particular about the lack of information regarding the suspicion against him, this concerns the minimum rights listed in Article 6(3)(a),(b) of the Convention and Article 30(1), (3) of the Constitution to be informed of the accusation and to prepare the defence.¹⁸ At the same time, these minimum rights are specific aspects of the concept of a fair trial in criminal proceedings in Article 6(1) of the Convention and Article 31(2) of the Constitution.¹⁹

15. In that light, the Chamber, being the master of characterisation to be given in law to the facts of the case before it,²⁰ finds that the Referral falls to be considered under Articles 30(1), (3) and 31(2) of the Constitution and Article 6(1), (3)(a),(b) of the Convention respectively.

¹⁷ As regards the incorporation of the Convention and its Protocols into the law of Kosovo at the constitutional level, see Kosovo, Constitutional Court, *Ćemailj Kurtiši and the Municipal Assembly of Prizren*, KO 01/09, Judgment, 27 January 2010 (18 March 2010), para. 40.

¹⁸ See ECtHR, *Mattoccia v. Italy*, no. 23969/94, ECHR 2000-IX, para. 60; *Sadak and Others v. Turkey (no. 1)*, nos. 29900/96 and 3 others, ECHR 2001-VIII, para. 50. All case law citations in this Decision are references to the case law of the European Court of Human Rights (the "ECtHR") unless otherwise specified.

¹⁹ See *Mattoccia v. Italy*, cited above, para. 58; *Gäfgen v. Germany* [GC], no. 22978/05, ECHR 2010, para. 169. See also *Dvorski v. Croatia* [GC], no. 25703/11, ECHR 2015, para. 76 *in fine*.

²⁰ See *Logachova and Others v. Ukraine*, nos. 4510/05 and 3 others, 10 December 2009, para. 10; *Margaretić v. Croatia*, no. 16115/13, 5 June 2014, para. 75. See Kosovo, Constitutional Court, *Constitutional review of the Judgment of the Supreme Court of the Republic of Kosovo, Rev. 308/2007, dated 10 June 2010*, KI 120/10, Judgment, 29 January 2013 (8 March 2013), para. 50.

2. The scope of review

16. The Chamber further observes that the Applicant complained that the SPO summons and interview procedure were incompatible also with Articles 19(2), 21(4)(a) and 38(3)(a) of the Law, and Rule 43(1) of the Rules of Procedure and Evidence (see paragraph 9 above).

17. In that regard, the Chamber reiterates that pursuant to Article 113(7) of the Constitution, under which the Referral was filed, individuals are entitled to refer to the Chamber violations of their individual rights and freedoms guaranteed by the Constitution. As it follows from the Chamber's findings in the *Decision on the referral of Mahir Hasani*, through the mechanism of individual constitutional referrals, the Chamber exercises a supervisory jurisdiction over proceedings before the Specialist Chambers and the Specialist Prosecutor's Office as regards their compliance with the fundamental rights and freedoms guaranteed by the Constitution.²¹

18. In that light, and in accordance with Article 49(1) and (3) of the Law, the task of this Chamber is to assess whether the irregularities complained of by the Applicant violated his individual rights and freedoms guaranteed by the Constitution. It is not the Chamber's function to deal with errors of fact or law allegedly made in the course of criminal proceedings unless and in so far as such errors may have infringed the fundamental rights and freedoms protected by the Constitution.²²

²¹ KSC-CC-2019-05, F00012, Decision on the referral of Mahir Hasani concerning Prosecution order of 20 December 2018, public, 20 February 2019, para. 24 (the "*Decision on the referral of Mahir Hasani*"). See Kosovo, Constitutional Court, *Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433jDO-318*, KO 26/15, Judgment, 14 April 2015, para. 65 *in fine*.

²² *Decision on the referral of Mahir Hasani*, para. 50. See *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, ECHR 2015, para. 61; *Perez v. France* [GC], no. 47287/99, ECHR 2004-I, para. 82. See Kosovo, Constitutional Court, *Request for constitutional review of Judgment Pml No. 225/2017 of the Supreme Court of 18 December 2017*, cited above, para. 38; *Constitutional review of Judgment Pml No. 44/2018 of the Supreme Court of 10 April 2018*, KI 72/18, Resolution on inadmissibility, 22 November 2018 (14 December 2018), para. 40; *Constitutional review of the Decision No. 2407/2006 of the Supreme Court of Kosovo, dated 30 September 2009*, KI 55/09, Judgment, 13 December 2010 (6 April 2011), paras 18, 21.

19. Applying the aforementioned principles to the case at hand, it follows that it is not the Chamber's role to decide on whether the SPO summons or interview procedure breached the Law or the Rules of Procedure and Evidence. The Chamber can only consider whether the alleged non-compliance by the SPO with the relevant provisions of the Law or the Rules of Procedure and Evidence infringed the Applicant's right to fair trial as guaranteed by the Constitution.

20. However, before the Chamber can entertain that discussion, it must first ascertain whether the Referral is admissible.

3. Findings on admissibility

21. As noted above, the Referral falls to be considered under Articles 30(1), (3) and 31(2) of the Constitution and Article 6(1), (3)(a),(b) of the Convention respectively. The Chamber reiterates that, as far as criminal matters are concerned, the primary purpose of Article 31 of the Constitution and Article 6 of the Convention is to ensure that an accused receives, as a whole, a fair trial by a court competent to determine a criminal charge.²³ Similarly, the minimums rights under Article 30(1), (3) of the Constitution and Article 6(3)(a),(b) of the Convention are not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole.²⁴

22. In the present case, the Referral concerns an early stage of criminal proceedings, namely an interview to the SPO, which is still conducting its investigations. The Referral therefore does not relate to a trial before a court within the meaning of Article 31 of the Constitution or Article 6 of the Convention. The Chamber also observes that, unlike in *Decision on the referral of Mahir Hasani*,²⁵ the Applicant in the

²³ See, for example, *Dvorski v. Croatia*, cited above, para. 76; *Nikolova v. Bulgaria* (dec.), no. 31195/96, 27 February 1997; *Guliyev v. Azerbaijan* (dec.), no. 35584/02, 27 May 2004.

²⁴ *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016, para. 251.

²⁵ *Decision on the referral of Mahir Hasani*, paras 41 et seq.

present case did not complain that there had been a threat of sanction for refusing to provide evidence to the SPO.

23. At the same time, the Chamber acknowledges that indeed Article 30 of the Constitution and Article 6(3) of the Convention may be relevant before a case is sent for trial. However, that applies “if and in so far as the fairness of the trial is liable to be seriously prejudiced by an initial failure to comply with [those] provisions”.²⁶ Since there has been no trial, the Chamber at this stage cannot speculate whether and what impact, if any, the impugned summons and interview procedure will have on the fairness of a trial, if any, as a whole.²⁷ In this connection, the Chamber cannot but note that the Applicant exercised his right to remain silent.

24. Even if there is a trial, which is yet unknown, the Applicant will have a possibility to raise to the competent panels the issues of fair trial in connection with the impugned summons and interview procedure. In this connection, the Chamber agrees with the SPO (see paragraph 11 above) that the Applicant will also have a possibility to raise these issues to a pre-trial judge, if assigned, under Article 39 of the Law. Besides, the Chamber notes that, after the final ruling in the criminal proceedings, if any, is given, the Applicant may re-submit his complaints to this Chamber if he still considers himself a victim of the alleged violations.

25. In view of the foregoing, the Chamber finds that, from the standpoint of Articles 30(1), (3) and 31(2) of the Constitution and Article 6(1), (3)(a),(b) of the Convention, the Referral is premature and, as such, must be declared inadmissible.

26. While the Chamber finds that the Referral must be dismissed for the above reasons, the Chamber deems it appropriate to address the SPO argument that, prior

²⁶ *Decision on the referral of Mahir Hasani*, para. 39; *Ibrahim and Others v. the United Kingdom*, cited above, para. 253; *Dvorski v. Croatia*, cited above, para. 76.

²⁷ *Decision on the referral of Mahir Hasani*, paras 39-40. See *Nikolova v. Bulgaria*, cited above; *Guliyev v. Azerbaijan*, cited above.

to applying to the Chamber, the Applicant should have exhausted the remedy provided in Article 33(2) of the Law (see paragraph 11 above).

27. In that regard, the Chamber points out that, for a remedy to be exhausted under Article 113(7) of the Constitution and Article 49(3) of the Law, it must be *effective*. It means that a remedy must be accessible and capable of examining the alleged violations of the fundamental rights and freedoms guaranteed by the Constitution. The existence of an effective remedy must also be sufficiently certain.²⁸

28. Applying the above principles to the procedure under Article 33(2) of the Law,²⁹ the Chamber observes that this possibility of review does not resemble a regular appeal procedure. Firstly, it is unclear whether this review is directly accessible to the Applicant.³⁰ Article 33(2) provides that the President of the Specialist Chambers “may” assign a single judge if, “in the view” of the President, such assignment is required (contrast with “shall assign” in Article 33(1), (3) of the Law). It thus emerges that the President may also decide not to assign a single judge. Hence, this review is not carried out automatically upon filing of an appeal by the Applicant. Secondly, in its case law the ECtHR has specified that, for a remedy to be effective, it must have precise time limits.³¹ Neither the Law nor the Rules of Procedure and Evidence specify a time limit within which the Applicant may request the President to assign a single

²⁸ See *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, ECHR 2013, para. 58; *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, ECHR 2014, para. 222; *Paksas v. Lithuania* [GC], no. 34932/04, ECHR 2011, para. 75; *Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II, para. 45; Kosovo, Constitutional Court, *Constitutional review of decision AC-I-14-0123 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters*, of 30 November 2017, KI 61/18, Resolution on Inadmissibility, 16 January 2019 (19 February 2019), para. 53.

²⁹ Article 33(2) of the Law reads in its relevant part as follows:

[...] the President of the Specialist Chambers *may* also assign a single judge from the Roster [...] to deal with a matter which, *in the view of the President of the Specialist Chambers*, requires the assignment of a judge other than the Pre-Trial Judge (a single judge panel). [...] (emphasis added)

³⁰ See *Williams v. the United Kingdom* (dec.) no. 32567/06, 17 February 2009; *Rizi v. Albania* (dec.), no. 49201/06, 8 November 2011, para. 44. See also *Galstyan v. Armenia*, no. 26986/03, 15 November 2007, para. 41.

³¹ *Williams v. the United Kingdom*, cited above; *Rustavi 2 Broadcasting Company Ltd and Others v. Georgia*, no. 16812/17, 18 July 2019, para. 267; *Rizi v. Albania*, cited above, para. 44; *Galstyan v. Armenia*, cited above, para. 39.

judge. The absence of time limits also creates uncertainty and renders nugatory the two-month time-limit in Rule 20(1)(b) of the Rules for filing of a referral before the Chamber.

29. The Chamber further observes that the Law or the Rules of Procedure and Evidence could be clearer as to the scope of review by a single judge assigned pursuant to Article 33(2) of the Law to enable the Applicant to ascertain that it relates to the breaches alleged. While the Chamber could accept that also judicial practice can clarify this, the aforementioned considerations regarding access to the procedure and time limits do not permit the Chamber to conclude that this procedure was a remedy to be taken into account for the purposes of Article 113(7) of the Constitution and Article 49(3) of the Law.

30. In that light, the Chamber considers it appropriate to dismiss the Referral as being premature. At this stage of proceedings, the Referral does not give rise to the appearance of a violation of the Applicant's right to fair trial under Articles 30(1), (3) and 31(2) of the Constitution and Article 6(1), (3)(a),(b) of the Convention. Consequently, the Referral must be declared inadmissible pursuant to Rule 14(f) of the Rules.

VI. CLASSIFICATION

31. As noted above, the Specialist Prosecutor requested to reclassify the Referral from public to confidential (see paragraph 3 above). By the summary decision of 20 November 2019, the Chamber rejected this request. It also stated that the reasons for this decision would be set out in its ruling on the Referral.³² The Chamber thus provides the reasons as outlined below.

³² KSC-CC-2019-07, F00007, Summary decision on the Prosecution Request to reclassify the filing KSC-CC-2019-07/F00001, public, 20 November 2019, para. 5.

32. The Chamber points out that the public character of its records is directly linked to the fundamental principle enshrined in Article 31(2) and (3) of the Constitution that justice be administered in public. This fundamental principle protects the persons concerned against the administration of justice in secret with no public scrutiny. It is also one of the means whereby confidence in the Chamber can be maintained.³³ In addition, the Chamber notes the following aspects as to why public character of its records is of particular relevance. Firstly, the Chamber deals with constitutional matters, which have implications for the legal system of the Specialist Chambers. Therefore, there is a high expectation of publicity. Secondly, the Chamber generally decides cases by means of a written rather than oral procedure. While this does not of itself raise an issue as the Chamber's review focuses on constitutional matters,³⁴ public records are essential for maintaining the transparency of its written proceedings.

33. In that light, convincing reasons are required for the Chamber to depart from the public character of its records. In particular, where that is necessary in order to protect other important interests at stake, for example, privacy or safety of a person, children, other vulnerable persons, or confidential investigation materials, or where the publicity would prejudice the interests of justice.

34. In the present case, the SPO requested the Chamber to reclassify the Referral from public to confidential in order to protect the confidentiality and integrity of an ongoing investigation.³⁵ In this respect, the Chamber observes that the SPO itself decided, at this stage of its proceedings, to invite the Applicant for an interview and inform him of the ongoing investigation. Thus, it was a SPO decision to disclose that

³³ In this regard, see *Martinie v. France* [GC], no. 58675/00, ECHR 2006, para. 39; *Juričić v. Croatia*, no. 58222/09, 26 July 2011, para. 84.

³⁴ See *Meimanis v. Latvia*, no. 70597/11, 21 July 2015, paras 48 *et seq.*

³⁵ KSC-CC-2019-07, F00003, RED, Public redacted version of 'Prosecution request for reclassification of filing KSC-CC-2019-07/F00001', dated 15 November 2019, public redacted, 18 November 2019, para. 1.

information. In this connection, the Chamber also notes that the media have already published information regarding the Applicant's interview to the SPO.³⁶

35. Further, the information about the investigation as contained in the Referral is general. It does not indicate factual allegations, evidence, witnesses or their statements, or investigative measures. The Chamber is thus unable to discern how the classification of the Referral as public endangers the integrity of the investigation, especially when the SPO has not advanced concrete reasons in this regard.

36. In view of the foregoing, the Chamber decided on 20 November 2019,³⁷ to reject the SPO reclassification request.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

Declares the Referral concerning the summons and interview procedure by the Specialist Prosecutor's Office inadmissible.



Vidar Stensland
Presiding Judge

Done in English on Monday, 13 January 2020

At The Hague, the Netherlands

³⁶ See, for example, "Hague Prosecutors quizzed Kosovo Justice Ministry Official", 21 October 2019, *Gazeta Express* <<https://www.gazetaexpress.com/hague-prosecutors-quizzed-kosovo-justice-ministry-official/>> (accessed 13 January 2020).

³⁷ KSC-CC-2019-07, F00007, Summary decision on the Prosecution Request to reclassify the filing KSC-CC-2019-07/F00001, public, 20 November 2019.