



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**Case number:** KSC-CC-2022-19

**Before:** The Specialist Chamber of the Constitutional Court

Judge Vidar Stensland, Presiding

Judge Roumen Nenkov

Judge Romina Incutti

**Registrar:** Fidelma Donlon

**Date:** 15 December 2022

**Language:** English

**File name:** Referral to the Constitutional Court Panel concerning the violation of Mr Shala's fundamental rights guaranteed by Articles 31 and 32 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights

**Classification:** Public

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**Public Redacted Version of the  
Decision on the Referral of Pjetër Shala Concerning Fundamental  
Rights Guaranteed by Articles 31 and 32 of the Kosovo Constitution and Articles 6  
and 13 of the European Convention on Human Rights**

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**Applicant**

Pjetër Shala

**Acting Specialist Prosecutor**

Alex Whiting

## The Specialist Chamber of the Constitutional Court

Composed of

Vidar Stensland, Presiding Judge

Roumen Nenkov, Judge

Romina Incutti, Judge

Having deliberated remotely delivers the following Decision

### I. PROCEDURE

#### A. REFERRAL

1. On 1 November 2022, Mr Pjetër Shala (the “Applicant”) lodged with the Specialist Chamber of the Constitutional Court (the “Chamber”)<sup>1</sup> a referral, dated 31 October 2022, under Article 113(7) of the Constitution of the Republic of Kosovo (the “Constitution”) and Article 49(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (the “Law”).<sup>2</sup> On 10 November 2022, the Applicant filed a revised referral (the “Referral”).<sup>3</sup> The Applicant was represented by Mr Jean-Louis Gilissen, Mr Hédi Aouini and Ms Leto Cariolou.

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<sup>1</sup> With regard to the assignment of the Constitutional Court Panel under Article 33(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”), see KSC-CC-2022-19, F00002, Decision to Assign Judges to a Constitutional Court Panel, confidential, 1 November 2022. 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.

<sup>2</sup> KSC-CC-2022-19, F00001, Referral to the Constitutional Court Panel concerning the violation of Mr Shala’s fundamental rights guaranteed by Articles 31 and 32 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, confidential, 31 October 2022 (“KSC-CC-2022-19, F00001”).

<sup>3</sup> KSC-CC-2022-19, F00003, Revised version of referral to the Constitutional Court Panel concerning the violation of Mr Shala’s fundamental rights guaranteed by Articles 31 and 32 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, confidential, 10 November 2022 (“KSC-CC-2022-19, F00003”).

2. In the Referral, the Applicant complained about proceedings in KSC-BC-[REDACTED] against [REDACTED]. In particular, the Applicant claimed that certain decisions of [REDACTED] in KSC-BC-[REDACTED] and [REDACTED] had breached the Applicant's rights to fair trial and legal remedy, under Articles 31 and 32 of the Constitution and Articles 6 and 13 of the European Convention on Human Rights (the "Convention").<sup>4</sup> In his revised Referral, the Applicant raised a further complaint that his right to freedom of expression under Article 40 of the Constitution and Article 10 of the Convention had been breached.<sup>5</sup>

B. WRITTEN SUBMISSIONS, HEARING AND WORKING LANGUAGE

3. The Chamber considered that the Referral was sufficiently comprehensive and that no additional written submissions were necessary under Rule 15(2), (3) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (the "Rules").<sup>6</sup> As regards the Applicant's request to schedule an oral hearing,<sup>7</sup> the Chamber considered that it could decide on the Referral without a hearing and thus decided to dismiss the Applicant's request for an oral hearing pursuant to Rule 15(4) of the Rules.

4. The Chamber, pursuant to Article 20 of the Law and Rule 5 of the Rules, decided that the working language of the present proceedings would be English with official translation provided by the Registry into the official languages of the Specialist Chambers, namely, Albanian, Serbian and English.

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<sup>4</sup> KSC-CC-2022-19, F00001, paras 1-5; KSC-CC-2022-19, F00003, paras 1-6, 8; [REDACTED].

<sup>5</sup> KSC-CC-2022-19, F00003, paras 5, 39-40.

<sup>6</sup> See KSC-CC-2022-18, F00004/RED, Public redacted version of the decision on the referral of Pjetër Shala to the Constitutional Court Panel concerning fundamental rights guaranteed by Articles 30 and 31 of the Kosovo Constitution and Article 6 of the European Convention on Human Rights, public, 22 August 2022 (*"Decision on the referral of P.Shala concerning access to material"*), para. 3 *in fine*; KSC-CC-2022-15, F00010, Decision on the referral of Hashim Thaçi concerning the right to an independent and impartial tribunal established by law and to a reasoned opinion, public, 13 June 2022 (*"Decision on the referral of H.Thaçi concerning jurisdictional challenge"*), paras 44-45.

<sup>7</sup> KSC-CC-2022-19, F00001, para. 34; KSC-CC-2022-19, F00003, para. 49.

## C. EXAMINATION OF THE REFERRAL

5. The Chamber examined the Referral based on the Referral, as revised, and the documents referred to therein. This decision refers to the facts of the case and the submissions of the Applicant insofar as relevant for the Chamber's assessment of the Referral.

## II. THE FACTS

### A. [REDACTED]

6. [REDACTED].<sup>8</sup>

7. [REDACTED].<sup>9</sup> The [REDACTED] proceedings were assigned a file number KSC-BC-[REDACTED].

### B. APPLICANT'S REQUEST IN KSC-BC-[REDACTED]

8. [REDACTED].<sup>10</sup> On 25 April 2022, the Applicant requested the [REDACTED] to disqualify the Specialist Prosecutor from prosecuting [REDACTED] in case KSC-BC-[REDACTED] and appoint an *amicus curiae* prosecutor instead.<sup>11</sup> The Applicant also sought leave to file a public redacted version of this request.<sup>12</sup>

9. On 29 July 2022, the [REDACTED] decided that the Applicant lacked standing to file the aforementioned disqualification request and that no public redacted version thereof could be allowed.<sup>13</sup> On 29 August 2022, the [REDACTED] found that the Applicant lacked standing to seek leave to appeal against this decision.<sup>14</sup>

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<sup>8</sup> [REDACTED].

<sup>9</sup> [REDACTED].

<sup>10</sup> KSC-CC-2022-19, F00001, para. 7; KSC-CC-2022-19, F00003, para. 8.

<sup>11</sup> [REDACTED]; KSC-CC-2022-19, F00001, para. 9; KSC-CC-2022-19, F00003, para. 10.

<sup>12</sup> [REDACTED], paras 24-25.

<sup>13</sup> [REDACTED] ("[REDACTED] decision"), paras 11, 13-17.

<sup>14</sup> [REDACTED].

C. [REDACTED]

10. On 15 September 2022, the Specialist Prosecutor, pursuant to Article 35(2)(g) of the Law, notified the [REDACTED] of the Specialist Chambers that [REDACTED].<sup>15</sup>

### III. ALLEGED VIOLATIONS

11. The Applicant complained before the Chamber that, as a result of the [REDACTED] decision to deny the Applicant standing to file the disqualification request, there had been a breach of his right to: (i) fair trial and equality of arms, as [REDACTED], depriving the Applicant of an important finding as to [REDACTED] credibility;<sup>16</sup> (ii) access to court and legal remedy in respect of an interference with the Applicant's right to fair trial due to, essentially, the inaction and inappropriate conduct on part of the SPO;<sup>17</sup> and (iii) public trial, as the Applicant was not permitted to file a public redacted version of his disqualification request.<sup>18</sup> In this regard, the Applicant alleged the violation of Articles 31 and 32 of the Constitution and Articles 6 and 13 of the Convention.

12. In his revised Referral, filed on 10 November 2022 (see paragraph 1 above), the Applicant raised a further complaint that the [REDACTED] decision not to allow the Applicant to file a public redacted version of his disqualification request (see paragraph 9 above) had also breached the Applicant's right to freedom of expression, under Article 40 of the Constitution and Article 10 of the Convention.<sup>19</sup>

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<sup>15</sup> [REDACTED]; KSC-CC-2022-19, F00001, para. 14; KSC-CC-2022-19, F00003, para. 15.

<sup>16</sup> KSC-CC-2022-19, F00001, paras 4, 22, 26-27; KSC-CC-2022-19, F00003, paras 4, 6, 28, 33-34.

<sup>17</sup> KSC-CC-2022-19, F00001, paras 2-3, 29, 32-33; KSC-CC-2022-19, F00003, paras 3, 36-38, 43-48.

<sup>18</sup> KSC-CC-2022-19, F00001, paras 5, 30-31; KSC-CC-2022-19, F00003, paras 5, 39-41.

<sup>19</sup> KSC-CC-2022-19, F00003, paras 5, 39-41.

#### IV. JURISDICTION

13. The Chamber observes that the Applicant filed the Referral under Article 113(7) of the Constitution and raised complaints in relation to the proceedings in KSC-BC-[REDACTED] and KSC-BC-2020-04 conducted before the Specialist Chambers. The Referral therefore relates to the Specialist Chambers and the Specialist Prosecutor's Office, as required by Article 162(3) of the Constitution and Articles 3(1) and 49(2) of the Law. Accordingly, the Chamber has jurisdiction to rule on the Referral.

#### V. ADMISSIBILITY

14. At the outset, the Chamber recalls that, pursuant to Article 113(1) of the Constitution, the Chamber decides only on matters "referred to [it] in a legal manner by authorised parties".<sup>20</sup> Rule 15(1) of the Rules provides that the Chamber shall decide on "the admissibility and/or the merits of a referral" made under Article 49 of the Law. These provisions provide for the Chamber's responsibility to first ascertain *ex officio* whether the Referral is admissible or not.<sup>21</sup> In this regard, Rule 14(f) of the Rules provides that a referral shall be inadmissible if nothing in the referral gives rise to the appearance of a violation of a constitutional right. Further, Rules 14(d) and 20(1)(b) provide that a referral shall be inadmissible where filed more than two months from the final ruling concerning the alleged violation. The Chamber thus turns to the question of admissibility.

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<sup>20</sup> See *Decision on the referral of H.Thaçi concerning jurisdictional challenge*, para. 42; KSC-CC-2020-08, F00020/RED, Public redacted version of decision on the referral of [REDACTED] further to a decision of the Single Judge, public, 20 April 2020 ("*Decision concerning a decision of the single judge*"), para. 37. See also, for example, Kosovo, Constitutional Court, *Constitutional review of decision Ae no. 287/18 of the Court of Appeals of 27 May 2019 and decision I.EK. no. 330/2019 of the Basic Court in Prishtina, Department for Commercial Matters, of 1 August 2019*, KI 195/19, Judgment, 5 May 2021 (31 May 2021), paras 68-69; *Constitutional review of decision Pml no. 313/2018 of the Supreme Court of 10 December 2018*, KI 12/19, Resolution on inadmissibility, 10 April 2019 (3 May 2019), paras 30-31.

<sup>21</sup> *Decision on the referral of H.Thaçi concerning jurisdictional challenge*, paras 42-43.

## A. APPLICANT'S SUBMISSIONS

15. The Applicant submitted that the Referral was admissible. In particular, he argued that he was a direct victim of the alleged violations of his rights under Articles 31 and 32 of the Constitution and Articles 6 and 13 of the Convention, as he had been directly affected by the [REDACTED] decision of 29 July 2022 and [REDACTED] (see paragraphs 9-10 above). Furthermore, the outcome in KSC-BC-2020-04 could not affect the Applicant's victim status,<sup>22</sup> and his complaints concerned the proceedings in KSC-BC-[REDACTED].<sup>23</sup>

16. Further, the Applicant argued that he had exhausted all available effective remedies by seeking leave to appeal against the [REDACTED] decision. He also had filed the Referral within two months of: (i) the [REDACTED] refusal of leave to appeal (see paragraph 9 *in fine* above);<sup>24</sup> and (ii) [REDACTED] (see paragraph 10 above).<sup>25</sup>

## B. CHAMBER'S ASSESSMENT

17. The Chamber first recalls that, pursuant to Article 113(7) of the Constitution and Article 49(3) of the Law, individuals are authorised to make referrals on alleged "*violations*" of "*their individual rights and freedoms guaranteed by the Constitution*" (emphasis added). This is further set out in Rule 20(1) of the Rules.

18. It must therefore be ascertained whether the Applicant may claim to be a victim of the alleged violations of Articles 31 and 32 of the Constitution and Articles 6 and 13 of the Convention,<sup>26</sup> pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 20(1) of the Rules.

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<sup>22</sup> KSC-CC-2022-19, F00001, paras 16, 18-20; KSC-CC-2022-19, F00003, paras 23-26.

<sup>23</sup> KSC-CC-2022-19, F00003, para. 25.

<sup>24</sup> KSC-CC-2022-19, F00001, paras 16-17; KSC-CC-2022-19, F00003, paras 17-22.

<sup>25</sup> KSC-CC-2022-19, F00003, para. 17.

<sup>26</sup> Insofar as the Applicants relied also on the Convention, the Chamber recalls that, by virtue of Article 22(2) of the Constitution, those guarantees apply at the constitutional level. See KSC-CC-2022-13, F00010; KSC-CC-2022-14, F00009, Decision on the referral of Jakup Krasniqi concerning the legality



19. In this regard, the Chamber observes that the Applicant raised his complaints in respect of case KSC-BC-[REDACTED]. However, Article 31(2) of the Constitution and Article 6(1) of the Convention provide for everyone's right to a fair and public trial in the determination of a "criminal charge against him[/her]".<sup>27</sup> The proceedings in KSC-BC-[REDACTED] did not concern the determination of a "criminal charge" against the Applicant, [REDACTED] (see paragraph 6 above). Also, there is no indication that KSC-BC-[REDACTED] concerned the determination of the Applicant's civil rights. Therefore, the guarantees of Article 31(2) of the Constitution and Article 6(1) of the Convention do not apply to the Applicant in KSC-BC-[REDACTED].<sup>28</sup>

20. Furthermore, the Chamber observes that the Applicant essentially disputed [REDACTED] and insisted that the [REDACTED] against [REDACTED] be pursued by an *amicus curiae* prosecutor and be examined by a court (see paragraphs 2, 11, 15 above). However, as also held by the Kosovo Constitutional Court and the ECtHR, neither the Constitution nor the Convention guarantee the right to have third parties prosecuted for a criminal offence.<sup>29</sup>

21. It follows that the Applicant may not claim to be a victim of the alleged violation of the right to fair trial under Article 31 of the Constitution and Article 6 of the

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of charging joint criminal enterprise and the referral of Kadri Veseli concerning decision of the appeals panel on challenges to the jurisdiction of the Specialist Chambers, public, 13 June 2022 ("*Decision on the referrals of J.Krasniqi and K.Veseli concerning criminal charges*"), para. 34, with further case law references.

<sup>27</sup> Article 31(2) of the Constitution in Albanian: "*Çdokush gëzon të drejtën për shqyrtim publik të drejtë dhe të paanshëm lidhur me vendimet [...] për cilëndo akuzë penale që ngrihet kundër saj/tij [...]*" (emphasis added) Article 31(2) of the Constitution in Serbian: "*Svako ima pravo na javno, nepristrasno i pravično razmatranje odluka [...] za bilo koje krivično gonjenje koje je pokrenuto protiv njega/nje, [...]*" (emphasis added)

The texts in Albanian and Serbian as published in the Official Gazette of Kosovo on 9 April 2008, at <<https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>> accessed 20 November 2022.

Article 6(1) of the Convention: "*In the determination of [...] any criminal charge against him, everyone is entitled to a fair and public hearing [...]*" (emphasis added)

See Kosovo, Constitutional Court, *Constitutional review of decision Pml no. 313/2018 of the Supreme Court of 10 December 2018*, KI 12/19, Resolution on inadmissibility, 10 April 2019 (3 May 2019), para. 40; *Decision on the referrals of J.Krasniqi and K.Veseli concerning criminal charges*, para. 51, footnote 102.

<sup>28</sup> See, for example, ECtHR, *Arlewin v. Sweden*, no. 22302/10, 1 March 2016, para. 51.

<sup>29</sup> See ECtHR, *X v. San Marino* (dec.), no. 76795/13, 19 April 2016, para. 18; *B.Č. v. Slovakia* (dec.), no. 11079/02, 14 March 2006, para. 2 (in the Law part); Kosovo, Constitutional Court, KI 12/19, cited above, paras 38-39.



Convention in KSC-BC-[REDACTED]. The same conclusion applies to the alleged violation of Article 32 of the Constitution and Article 13 of the Convention as the right to legal remedy has no independent existence and can only be applied in combination with a purported violation of another right.<sup>30</sup>

22. At the same time, the Chamber observes that the Applicant's above constitutional complaints in respect of KSC-BC-[REDACTED] are linked to his criminal trial in KSC-BC-2020-04. In particular, [REDACTED]. However, it will be open to the Applicant, in the course of his trial, to dispute [REDACTED] evidence and raise any possible issues as regards its credibility or reliability, and aspects of publicity in connection with KSC-BC-[REDACTED]. Furthermore, and as the case may be, these issues are yet to be decided by other competent panels of the Specialist Chambers, with due regard to the requirements of the fairness of a trial. Hence, it is premature for the Applicant to complain about the alleged violations Articles 31 and 32 of the Constitution and Articles 6 and 13 of the Convention in respect of KSC-BC-2020-04.<sup>31</sup>

23. The Chamber therefore finds that the Applicant's complaints under Articles 31 and 32 of the Constitution and Articles 6 and 13 of the Convention must be declared inadmissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 14(f) of the Rules. The Chamber reiterates that the above conclusion is without prejudice to the assessment by the Chamber of any future referrals the Applicant may submit in relation to the proceedings against him.

24. Without prejudice to the Chamber's aforementioned findings, the Chamber observes that the Applicant's disqualification request raised an issue of whether a request to disqualify the Specialist Prosecutor had, in general, a legal basis in the

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<sup>30</sup> See, for example, ECtHR, *Zavoloka v. Latvia*, no. 58447/00, 7 July 2009, para. 35(a).

<sup>31</sup> See *Decision on the referral of P.Shala concerning access to material*, paras 20-21; KSC-CC-2019-07, F00013, *Decision on the referral of Driton Lajci concerning interview procedure by the Specialist Prosecutor's Office*, public, 13 January 2020, paras 24-25. See also *Decision on the referral of H.Thaçi concerning jurisdictional challenge*, paras 65, 67.

Specialist Chambers' legal framework.<sup>32</sup> This aspect, depending on a specific constitutional violation alleged, may be relevant for the requirement of exhaustion of remedies before the Chamber, pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 20(1) of the Rules. In this regard, the Chamber observes that, in [REDACTED] decision, the [REDACTED] referred to the Applicant's request as of "disqualification of the specialist prosecutor".<sup>33</sup> At the same time, the [REDACTED] did not address specifically the issue of the legal basis of the remedy pursued and whether and how it would have operated. [REDACTED] dismissed the Applicant's request exclusively on the grounds that the Applicant, not being a party in KSC-BC-[REDACTED], lacked legal standing to intervene in that case.<sup>34</sup> While it would therefore emerge that, in relation to KSC-BC-[REDACTED], the Applicant pursued a remedy unavailable to him because of not being a "party" to those proceedings, the Chamber does not need to address the question from the angle of exhaustion in this specific case.

25. Lastly, as regards the Applicant's complaint on his right to freedom of expression under Article 40 of the Constitution and Article 10 of the Convention (see paragraph 12 above), the Chamber observes that this complaint was lodged on 10 November 2022. This is more than two months after the [REDACTED] decision of 29 August 2022 denying the Applicant standing to challenge the impossibility to file a public redacted version of his disqualification request (see paragraph 9 above). As regards constitutional complaints not included in the initial referral, the running of the two-month period in Rule 20(1)(b) of the Rules is not interrupted until the date when the complaint is first submitted to the Chamber.<sup>35</sup> It follows that the Applicant's

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<sup>32</sup> [REDACTED] decision, para. 6 (point (ii)).

<sup>33</sup> [REDACTED] decision, para. 11 *in fine*.

<sup>34</sup> [REDACTED] decision, paras 11, 13, 15, referring to Rule 75(1), in conjunction with Rule 2(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, where Rule 75(1) provides that a "party may apply before the competent panel for a relief".

<sup>35</sup> See, for example, ECtHR, *Allan v. the United Kingdom* (dec.), no. 48539/99, 28 August 2001; *Adam and Others v. Germany* (dec.), no. 290/03, 1 September 2005; *Božinovski v. the former Yugoslav Republic of Macedonia* (dec.), no. 68368/01, 1 February 2005.

specific complaint on freedom of expression must be dismissed as out of time, pursuant to Rule 14(d) of the Rules.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

1. *Declares* the Referral of Mr Pjetër Shala, as revised, inadmissible; and
2. *Dismisses* the Referral, as revised, in its entirety.



**Vidar Stensland**  
**Presiding Judge**

Done in English on Thursday, 15 December 2022  
At The Hague, the Netherlands