

In: KSC-CC-2024-23

Before: **The Specialist Chamber of the Constitutional Court**
Judge Vidar Stensland, Presiding
Judge Roumen Nenkov
Judge Romina Incutti

Registrar: Dr Fidelma Donlon

Filing Participant: Duty Counsel for Isni Kilaj

Date: 21 April 2024

Language: English

File name: Referral by Sabit Januzi, Ismet Bahtijari and Haxhi Shala to the Constitutional Court Panel concerning the violation of their fundamental rights guaranteed by Article 30 and 31 of the of the Kosovo Constitution and Article 6 of the European Convention on Human Rights

Classification: Public, with Public Annexes 1-2 & Conf. Annexes 3-5

**Kilaj Application to Join Referral to
Specialist Chamber of the Constitutional Court**

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I. INTRODUCTION

1. On 22 February 2024, the Registrar issued KSC-BD-25-Rev1 which purported to amend the legal aid scheme of the Kosovo Specialist Chambers (“KSC”) by creating a new framework for the application of legal aid in cases in which interference with the administration of justice is alleged (“Impugned Regulations”).¹ Substantively, the Impugned Regulations reduce the rates of remuneration by between 60% and 75% for that category of cases in comparison with the rates of remuneration for such cases provided for by the previous legal aid regulations.² These are wholly unsustainable reductions. The impact of such extensive cuts on the right to a fair trial should, it is submitted, require little elaboration. But to provide context, Complexity Level 1 rates now remunerate Assigned Counsel on a part-time basis only, with no provision for support from Co-Counsel, legal associates or any other support staff whatsoever. Not only is this self-evidently inadequate, it also defeats its own stated purpose of providing the means for Counsel be to be retained on a full-time basis *and* to be supported by a team.³
2. Procedurally, and to compound the unfairness of this extraordinary development, the Impugned Regulations were introduced without notice to or consultation with the Defence, notwithstanding the spirit of transparency encouraged by the Rules concerning legislative amendment.⁴ At the time, four

¹ KSC-BD-25-Rev1, Legal Aid Regulations

² Complexity Level 1 rates were reduced by 75%, Level 2 rates were reduced by 60%, Level 3 rates were reduced by 64%, *see* Annex 1 (public)

³ *See* SUBMISSIONS, (a) The Impugned Regulations are internally inconsistent and self-defeating, *infra* paras 13-17

⁴ *See* KSC-BD-04-Rev2, Directive on Counsel (“Directive on Counsel”), s. 3(1) “The Registrar may consult with the Independent Representative Body of Specialist Counsel regarding any amendment proposal” concerning the Directive on Counsel; s. 3(2) “The Registrar shall keep a record of the amendment procedure, informing those who submitted amendment proposals of the outcome. The Registrar may, as appropriate, make public (parts of) the amendment procedure”. *See also* Law No. 05/L-053, the Law on Specialist Chambers and Specialist Prosecutor’s Office, (“Law”), Article 19(4) “The Rules of Procedure and Evidence may be amended by the Judges in Plenary, having consulted with the Specialist Prosecutor and the Registrar, who shall represent the interests of the Defence and Victims.

individuals, one of whom is Mr Kilaj, were remanded in custody in cases involving interference with the administration of justice, with their legal aid yet to be determined. As was obvious at the time, their rights unquestionably would be affected by the Impugned Regulations. Yet, they were not consulted on how the changes would affect their rights. Indeed, the timing of the Impugned Regulations suggests they had more to do with the Kosovan Ministry of Justice's decision just 20 days earlier to cut support in the same category of cases to even more unsustainable levels⁵ than the even application of the right to a fair trial.⁶

3. Not only did the Registry fail to consult on the substance of the changes introduced by the Impugned Regulations, it appears clear it deliberately sought to conceal their imminent introduction. On 13 February 2024, just nine days before the Impugned Regulations were issued, the Registry participated in a status conference in Case 10 in which the developing legal aid crisis was the first item on the agenda.⁷ The Pre-Trial Judge explicitly raised the prospect of the Case 10 defendants needing to use the KSC legal aid scheme to resolve what was at the time an impasse with the Kosovo Ministry of Justice over funding.⁸ Despite being asked by the Pre-Trial Judge to provide relevant updates on the issue of funding, at no point did the Registry see fit to inform the participants in the status conference that the legal aid regime was about to be slashed for the defendants in Case 10.⁹

The Registrar may consult with the independent representative body of Specialist Counsel for this purpose.”

⁵ See Annex 2 (public), Administrative Instruction MOJ - No. 01/2024 on Amending and Supplementing the Administrative Instruction MoJ – Mo. 08/2022 on the Legal Protection of Persons Potentially Accused of Alleged Crimes in Trials Before the Specialist Chambers

⁶ *Contra* Constitution, Article 55, “Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.”

⁷ KSC-BC-2023-10, Status Conference Transcript, 13 February 2024, p. 137

⁸ *Ibid.*, p. 159

⁹ *Ibid.*, pp 162-164

4. On 6 March 2024, after the Impugned Regulations had been issued, a request on behalf of Mr Kilaj for disclosure of details pertinent to their enactment was emailed to the Registry. The request, which is reproduced in full at confidential Annex 3, sought details of matters including:
- a. “The rates which were considered by the previous legal aid regulations to represent adequate resourcing were cut by 60-75% on a like-for-like comparison. What change in circumstances justified such a precipitous and sudden shift in policy towards the resourcing of the defence?”
 - b. “What consideration was given the regimes of other comparable international courts and tribunals? For example, what justification was considered for offering between 10-30% of the resourcing offered by the ICC for Art 70 cases?”
 - c. “[W]hat consultation was conducted to ensure that what appears to be a new and alarming inequality of arms between contempt case defendants and the SPO would not in fact unduly prejudice those defendants?”
5. It is submitted that these were reasonable and wholly justifiable requests in the circumstances. This was one of a number of similar requests made on behalf of the other three individuals in a similar position. However, beyond acknowledging receipt, and despite two follow-up emails,¹⁰ the Registry has not responded substantively to any of the requests, thereby maintaining its posture of disengagement in any meaningful or constructive way with the Defence. Indeed, at a status conference on 22 March 2024, the Registry confirmed that it did not intend to respond to the disclosure requests,¹¹

¹⁰ See Annexes 4 and 5 (confidential)

¹¹ KSC-BC-2023-10, Status Conference Transcript, 22 March 2024, pp 223-224, “[b]ecause of the extensive communication [with the Defence teams], there is very little I can add of substance. [...] In the meantime, there are no disclosure obligations. There are no disclosures that is going to happen.”

claiming that “there have been no cuts in legal aid for these defendants” citing the fact that decisions on legal aid had yet to be made.¹²

6. This submission did the Registry no justice. Whether it was made of intransigence or a fundamental misapprehension of the matters at issue, it all but confirms that no assessment has been undertaken by the Registry on the impact to the constitutional rights of contempt-case defendants by cuts of 60-75% to the funding of their defence teams. By any standard, this amounts to a striking neglect.¹³
7. On 2 April 2024, Mr Januzi, Mr Bahtijari and Mr Shala (“Applicants”), the three defendants in Case 10, jointly referred the constitutional validity of the Impugned Regulations to the Specialist Chamber of the Constitutional Court (“SCCC”, “Referral”).¹⁴
8. In essence, the Referral demonstrates that the Impugned Regulations violate the Constitution, that the Impugned Regulations have been constitutionally invalid in their entirety *ab initio*,¹⁵ and that they should be set aside from the date of their enactment.
9. Mr Kilaj has standing to join the Referral as an “individual authorised under Article 113(7) of the Constitution and Article 49(3) of the Law”¹⁶ and hereby moves the SCCC to recognise his right to do so. Mr Kilaj has been in detention since his arrest on 2 November 2023, awaiting a decision on the confirmation of charges against him, without legal aid funding at present. Like the

¹² *Ibid.*, p. 223.

¹³ *See, eg*, Law, Article 19(4), placing obligations on the Registry to represent the interests of the Defence in the legislative amendment process

¹⁴ KSC-CC-2024-23/F00001, Referral by 1) Sabit JANUZI, 2) Ismet BAHTIJARI and 3) Haxhi SHALA to the Specialist Chamber of the Constitutional Court Concerning the Constitutional Validity of KSC-BD-25/Rev1 (Revised Legal Aid Regulations), 2 April 2024, public

¹⁵ Invoking Rule 29 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court, (“RPSCCC”)

¹⁶ RPSCCC, Rule 4(c)

Applicants, he will (if charges are confirmed) be a defendant whose legal aid will be determined under the Impugned Regulations (subject to the outcome of the current litigation).

10. Mr Kilaj adopts the Referral in its entirety, and makes these supplementary submissions.
11. Mr Kilaj relies upon the arguments set out in the Referral which demonstrate the jurisdiction of the SCCC in this matter, without need for amplification, save to say that the RPSCCC specifically envisage that the SCCC will have oversight of the enactment and any subsequent amendment of the Rules of Procedure and Evidence,¹⁷ and specifically their compliance with the rights guaranteed by Chapter II of the Constitution. Prominent amongst the Chapter II guarantees is the right to “free legal assistance [for] those without sufficient financial means [...] to ensure effective access to justice”.¹⁸ Whilst the current issue does not technically involve an amendment to the RPE, it falls squarely within the ambit of the above right, which ultimately the SCCC has a responsibility to ensure.

II. SUBMISSIONS

12. The Impugned Regulations are constitutionally invalid, and therefore should be set aside. Specifically, they unlawfully limit Mr Kilaj’s right to “free legal assistance [...] *necessary* to ensure *effective* access to justice”.¹⁹ This is for the reasons set out in the Referral, and the following additional reasons:

¹⁷ *Ibid.*, Rules 12(1) and 13(1)

¹⁸ Constitution, Article 31(6)

¹⁹ *Ibid.* (emphasis added)

(a) The Impugned Regulations are internally inconsistent and self-defeating

13. The Impugned Regulations guarantee that the right to be provided with free legal assistance, in the context of proceedings before the KSC, must include Counsel operating full-time and with a team (of varying size and capability, depending on the complexity level determination, but which in all cases is intended to have a meaningful support capability), at least at all stages of proceedings post-confirmation of indictment. This can be surmised from the following provisions:
- a. Under Regulation 13, “the Legal Aid Fee shall be determined on the basis of [...] the scope of services (Part-Time or Full-Time) required by Counsel and his or her Team, as set forth in Regulation 17 and in Section 1 of Annex C”;²⁰
 - b. Section 1 of Annex C, as cited above, states in terms that all phases beyond the confirmation of charges should be funded at “full-time at the determined complexity level”;²¹
 - c. Section 2(2) of Annex C, introduced for the first time in the Impugned Regulations to differentiate upper limits on funding for contempt cases from all other cases, also suggests in terms that all phases beyond the confirmation of charges will be funded at “full-time”.²² Yet, it limits funding at rates that fall well below what is required for full-time engagement by Counsel;

²⁰ Impugned Regulations, Regulation 13(1)(c)

²¹ *Ibid.*, Annex C, s. 1

²² *Ibid.*, s. 2(2)

- d. Regulation 14 of the Impugned Regulations provides that “the Legal Aid Fee shall cover [...] remuneration of Counsel and members of his or her Team”;
 - e. According to Regulation 28, Assigned Counsel may assemble a team including “Co-Counsel, Legal Associates and Support Team Members”²³ and in so doing s/he should be guided by the demands upon him/her to ensure “the Accused’s right to a fair trial without delay”.²⁴ This seemingly creates an obligation to sufficiently resource a team capable of meeting fair and expeditious trial demands.
14. None of these provisions differentiate between cases involving allegations of interference with the administration of justice and so-called “substantive” cases.
15. Read in combination they promise the resources to Assigned Counsel to dedicate his/her time to the client’s defence with – in theory – an adequately constituted team in support.²⁵ In reality, however, the new limits placed on funding for contempt cases by the Impugned Regulations produce a deeply contrasting picture. The implications of those limits in terms of work hours at each complexity level are set out in Annex 1. As can be seen:
- a. the funding for Complexity Level 1 cases is sufficient to resource Counsel alone, on a part-time basis for only 68.75 hours per month, with no support team whatsoever;
 - b. the funding for Complexity Level 2 cases is sufficient to resource Counsel on a full-time basis for 104 hours, and one Co-Counsel on a

²³ *Ibid.*, Regulation 28(1)

²⁴ *Ibid.*, 28(3)

²⁵ Anyone with any experience of international criminal litigation will appreciate that this is what has always been required to defend cases of this complexity and severity

part-time basis for only 27 hours per month, but with no further support team; and

- c. the funding for Complexity Level 3 cases is sufficient to resource Counsel on a full-time basis for 104 hours, and one Co-Counsel on a part-time basis for only 52 hours per month, but with no further support team.

16. Even if *arguendo* Assigned Counsel and Co-Counsel were, in their discretion, to choose to allocate a reduced amount for their own remuneration, it is clear that the balance would still, realistically, be woefully inadequate to be able to attract additional suitably experienced team members. The Impugned Regulations are insufficient to provide for the building of a team composed of enough members possessing the sort of experience required for cases of this nature, and paid at a level that is anything like representative of a fair and adequate wage.

17. Whilst the Impugned Regulations rightly sought to endow defendants with full-time representation by a team of sufficiently experienced lawyers, the limits to funding simply cannot deliver those objectives. For those reasons it is submitted that the Impugned Regulations lack coherency and are fundamentally self-defeating.

(b) The Impugned Regulations fail to repeal the previous regime creating ambiguity as to whether KSC-BD-25 or KSC-BD-25-Rev1 governs the granting of legal aid

18. Regulation 4(3) fails to repeal the previous legal aid regime contained within KSC-BD-25. KSC-BD-25 is not effectively superseded and therefore remains in force.

19. Whereas it is accepted that the Impugned Regulations intended to replace the previous regime, the Registrar's failure to do so creates an ambiguity as to

which regime applies. That ambiguity should be resolved by setting aside the Impugned Regulations, being the second of the two regulations to come into force, until such time as KSC-BD-25 is effectively repealed.

20. The most generous interpretation is that this is a gross oversight in the preparation of the Impugned Regulations, which of course raises the prospect that they were not prepared with due consideration and caution. This would be entirely consistent with the Registry's failure to apply care and attention to the Defence's constitutional rights.

(c) The Impugned Regulations create a discriminatory system for the granting of legal aid

21. Not only does the Constitution guarantee "free legal assistance [for] those without sufficient financial means [...] to ensure effective access to justice"²⁶ as a component of the right to a fair trial, it also guarantees "equality before the law", in the sense that "[e]veryone enjoys the right to equal legal protection without discrimination."²⁷ The ECHR, binding on the KSC,²⁸ expresses this principle in the following terms: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground".²⁹
22. The Law clarifies the manner in which the principle of non-discrimination should apply in relation to the rights of the Defence:

[...] the accused shall be entitled to the following minimum guarantees, in full equality:

[...] to defend himself or herself through Specialist Counsel of his own choosing [...] and to have Specialist Counsel assigned to him or her, in any case where the

²⁶ Constitution, Article 31(6)

²⁷ *Ibid.*, Article 24(1)

²⁸ Law, Article 19(2)

²⁹ European Convention on Human Rights, Article 14. *See also* the International Covenant on Civil and Political Rights, Article 14(1), (3)(d)

interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it[.]³⁰

23. Whilst it is accepted that the allocation of legal aid can differ, in order to comply with the principle of equality before the law these differences must be justified on the basis of a material difference of circumstance. Any other conclusion would lead to arbitrariness.
24. The Impugned Regulations purport to create a system in which contempt-type defence teams are *in principle* funded at 60-75% less than so-called “substantive” cases. This is an inherently unequal and discriminatory system, that is both unjustified and unjustifiable. Differences in complexity between different cases were already taken into account by the complexity level determination. As such, disparities in complexity between contempt cases and “substantive” cases cannot rationalise the introduction of such an innately discriminatory system. The least that can be said is that Mr Kilaj is entitled to an explanation of why his rights are valued at such a discount compared to other accused in custody in the same detention unit, tried by the same court and funded by the same legal aid regime. The Registry’s silence on this matter has been deafening.

(d) The Impugned Regulations create an inequality of arms

25. The Impugned Regulations introduce a striking new inequality of arms between the Defence and the Prosecution. The principle of equality of arms between the Defence and the Prosecution “goes to the heart of the fair trial guarantee”,³¹ provided by Article 24 of the Constitution and Article 21 of the Law. This means that whilst the Defence does not have a right to the same

³⁰ Law, Article 21, “Rights of the Accused” (4)(e); *see also* (1) “All persons shall be equal before the Specialist Chambers”; *see also* Rome Statute, Article 67(1)(d); Statute of the International Tribunal for the Former Yugoslavia, Article 21; Statute of the International Criminal Tribunal for Rwanda, Article 19

³¹ IT-97-24-A, *Prosecutor v Milomir Stakić*, Judgment, 22 March 2006, para. 150

resources, “it does require a judicial body to ensure that neither party is put at a disadvantage when presenting its case”.³²

26. The inability at this stage to conduct a fact-specific assessment in the case of Mr Kilaj, prior to any decision confirming the indictment, cannot prevent the conclusion that defence funding for contempt-type cases will be incapable of delivering equality of arms in virtually every imaginable scenario. How would a Complexity Level 1 case, for example, in which the Impugned Regulations would fund nothing more than one part-time Counsel, meet the requirements of equality of arms, assessed against an experienced and well resourced SPO? The deficit which the Impugned Regulations creates is so stark that it is impossible to conceive of any situation in which that would be the case.
27. For example, it is submitted that, in every case, without the support of both a lawyer experienced in international criminal proceedings and a lawyer with knowledge and experience of Kosovan criminal law (not to mention an Albanian speaker), any defence team will be ill-equipped to meet the twin challenges of a court modelled on the international criminal tribunals, but operating within the jurisdiction of Kosovo. Article 12 makes it clear that the applicable body of criminal law at the KSC is a combination of customary international law and “the substantive criminal law of Kosovo as applicable at the times the crimes were committed”.³³ Furthermore, procedural questions concerning the application of the RPE “shall reflect the highest standards of international human rights law”, requiring detailed knowledge of the ECHR and the ICCPR as well as by the Kosovo Criminal Procedure Code.³⁴

³² *Ibid.*

³³ Law, Article 12

³⁴ *Ibid.*, Article 19(2)

28. The SPO of course has access to expertise in both international criminal law and Kosovo criminal law and procedure. Under the Impugned Regulations, Mr Kilaj, charged as he is with contempt-type offences, will not. This puts the Defence at a clear disadvantage in its ability to present its case and protect Mr Kilaj's interests, in violation of the principle of equality of arms.

(e) The SCCC must be satisfied that the Impugned Regulations limited the provision of legal assistance "for the purpose for which they were provided"³⁵

29. The Constitution prohibits the limitation of any of its Chapter II rights "for purposes other than those for which they were provided."³⁶ Furthermore, "[i]n cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation".³⁷ Finally, "[t]he limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right".³⁸

30. Thus, the Constitution provides an overlapping set of protections against the arbitrary denial of rights. This can be seen, for example, from the requirement that limitations cannot "deny the essence of the guaranteed right."³⁹

31. The Registrar to date has failed to explain and justify the purpose for limiting the rights to free legal assistance of Mr Kilaj, the Applicants and other prospective defendants before the KSC, despite reasonable and repeated

³⁵ Constitution, Article 55(3)

³⁶ *Ibid.*

³⁷ *Ibid.*, Article 55(4)

³⁸ *Ibid.*, Article 55(5)

³⁹ *Ibid.*

requests to do so.⁴⁰ Since the SCCC is obliged to ensure that the purpose and extent of the new limitations to fair trial rights is aligned with the demands of Article 55 of the Constitution, the Registrar must be compelled now to engage with these reasonable requests concerning the justification for these precipitous cuts, and, at a minimum, to provide answers to the questions posed in the Kilaj Defence request for disclosure, first sent on 6 March 2024.⁴¹

32. According to Article 19(4) of the Law, the Registry “shall represent the interests of the Defence” and in that pursuit “may consult with the independent representative body of Specialist Counsel for this purpose” where amendments of the RPE are concerned.⁴² Read in context, it is clear that ensuring the rights of accused and victims is a key concern of the Article 19 amendment process. This is because, despite their rights being engaged, the Defence is excluded from the amendment process. The Registry’s role, on behalf of the Defence, seeks to mitigate those concerns.
33. Whilst the introduction of the Impugned Regulations did not involve an amendment of the RPE, and therefore did not trigger the Article 19 process, the subject matter of the Impugned Regulations unquestionably engaged and eroded the rights of the Defence.
34. The Registry declined to consult Mr Kilaj’s representatives, or any Defence Counsel, as envisaged in Article 19(4). It is submitted that the Registry should at least have been guided by its duty to “represent the interests of the Defence” when it comes to amending the legal and regulatory framework, to ensure that the introduction of the Impugned Regulations would not violate the constitutional rights of the Defence. As was apparent from the Registrar’s

⁴⁰ See Annexes 3-5

⁴¹ See Annex 3

⁴² Law, Article 19(4); see also KSC-BD-04/Rev2, Directive on Counsel, s. 3: “The Registrar may consult with the Independent Representative Body of Specialist Counsel regarding any amendment proposal.”

refusal to engage with the reasonable requests for relevant information at the 22 March 2024 Status Conference,⁴³ it seems inherently unlikely that any such process was carried out.

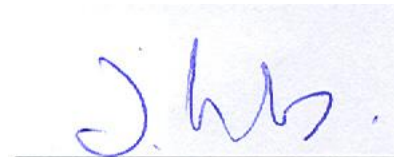
III. RELIEF SOUGHT

35. For all the foregoing reasons, the Kilaj Defence requests the SCCC to:
- a. **FIND** that Mr Kilaj's has standing to join Referral KSC-CC-2024-23;
 - b. **DIRECT** the Registrar to provide the information sought;⁴⁴
 - c. As an interim measure, **SUSPEND** the Impugned Regulations pending a final decision on the Referral and direct the Registrar to process requests for legal aid on the basis of KSC-BD-25;
 - d. **GRANT** the interim and final relief requested in the Referral; and
 - e. **FIND** that the Impugned Regulations are constitutionally invalid and, in accordance with its duty under Rule 29 of the RPSCCC, declare them void *ab initio*.

Word count: 3,999



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Sunday, 21 April 2024

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⁴³ KSC-BC-2023-10 Status Conference Transcript, 22 March 2024, p. 223

⁴⁴ See para. 4, *supra*, and Annex 3