



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

Case number: KSC-CC-2024-23

Before: The Specialist Chamber of the Constitutional Court

Judge Vidar Stensland, Presiding

Judge Roumen Nenkov

Judge Romina Incutti

Registrar: Fidelma Donlon

Date: 24 April 2024

Language: English

File name: Referral by Sabit Januzi, Ismet Bahtijari and Haxhi Shala to the Constitutional Court Panel Concerning a Question of Constitutional Compatibility and the violation of their fundamental rights guaranteed by Article 30 and 31 of the Kosovo Constitution and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms

Classification: Public

**Decision on the Referral of Sabit Januzi, Ismet Bahtijari and Haxhi Shala
to the Constitutional Court Panel Concerning the Constitutional
Validity of the Legal Aid Regulations of the Specialist Chambers**

Applicants

Sabit Januzi

Ismet Bahtijari

Haxhi Shala

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

1. On 3 April 2024, Mr Sabit Januzi, Mr Ismet Bahtijari and Mr Haxhi Shala (“Applicants”) made a referral¹ to the Specialist Chamber of the Constitutional Court (“Referral” and “Chamber”, respectively) under Articles 30, 31 and 113(7) of the Constitution of Kosovo (“Constitution”), Article 49(2) and (3) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 4(b) and (c), 21 and 29 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (“SCCC Rules”). The Applicants are represented by Mr Jonathan Elystan Rees and Mr Huw Bowden for Mr Januzi, Ms Felicity Gerry and Mr James O’Keefe for Mr Bahtijari, and Mr Toby Cadman and Mr John Cubbon for Mr Shala.

2. On 5 April 2024, the President of the Specialist Chambers (“SC”), pursuant to Article 33(3) of the Law, assigned the above Panel to rule on the Referral.²

3. On 16 April 2024, the Association of Defence Counsel Practising Before the International Courts and Tribunals requested leave to appear before the Chamber as *amicus curiae* (“ADC-ICT Request”).³

4. On 18 April 2024, the Chamber issued a decision wherein it, *inter alia*, indicated

¹ 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), 3 April 2024.

² KSC-CC-2024-23, F00002, Decision to Assign Judges to a Constitutional Court Panel, 5 April 2024.

³ KSC-CC-2024-23, F00003, ADC-ICT Request for Leave to Appear as *Amicus Curiae*, 16 April 2024.

that it did not consider it necessary to obtain further information or submissions from the Specialist Prosecutor's Office in relation to the Referral.⁴

5. On 21 April 2024, Mr Isni Kilaj filed a request to join the Referral ("Request for Joinder").⁵

II. THE FACTS

6. On 2 October 2023, the pre-trial judge confirmed an indictment against Mr Januzi and Mr Bahtijari, charging them with obstructing official persons in performing official duties and intimidation of a witness during criminal proceedings.⁶ The pre-trial judge confirmed an indictment against Mr Shala on 4 December 2023 for similar conduct,⁷ and the Applicants' cases were joined into one on 8 February 2024.⁸

7. On 22 February 2024, the Registrar adopted certain amendments to the SC's legal aid regulations ("2024 Legal Aid Regulations").⁹

III. ALLEGED VIOLATIONS

8. The Applicants complained before the Chamber that the rights afforded to them pursuant to Articles 30 and 31 of the Constitution, as well as Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention") were violated with the adoption by the Registrar of certain amendments to the 2024 Legal Aid Regulations. Furthermore, the Applicants

⁴ KSC-CC-2024-23/F00004, Decision on the Working Language and Further Proceedings, public, 18 April 2024.

⁵ KSC-CC-2024-23/F00005, Kilaj Application to Join Referral to Specialist Chamber of the Constitutional Court, public, 21 April 2024.

⁶ KSC-BC-2023-10/F00008/RED/COR, Corrected version of public redacted version of the decision on the confirmation of the indictment, public, 2 October 2023.

⁷ KSC-BC-2023-11/F00005/RED, Public redacted version of the decision on the confirmation of the indictment, public, 4 December 2023.

⁸ KSC-BC-2023-10/F00161/RED, Public redacted version of decision on request for joinder and amendment of the indictment, public, 8 February 2024.

⁹ KSC-BD-250/Rev1/2024, Registry practice direction, legal aid regulations.

challenge the “constitutional validity” of the 2024 Legal Aid Regulations and the request that the Chamber declare the regulations incompatible with the Constitution in accordance with Rule 29 of the SCCC Rules.

IV. JURISDICTION

9. The Chamber recalls that the Applicants filed the Referral under Article 113(7) of the Constitution and raised complaints in relation to the proceedings conducted against them before the SC. The Referral therefore relates to the SC, 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

A. CONSTITUTIONAL RIGHTS AT ISSUE

10. As noted above, the Applicant’s complaints relate to Articles 30 and 31 of the Constitution, as well as Article 6 of the Convention. The Chamber recalls that, by virtue of Article 22(2) and (3) of the Constitution, the guarantees set forth in the Convention apply at the constitutional level.¹⁰ The Kosovo Constitutional Court has reiterated that the rights and freedoms guaranteed by international instruments in Article 22 of the Constitution “have the status of norms of constitutional rank and are an integral part of the Constitution, in the same way as all other provisions contained

¹⁰ See KSC-CC-2022-14, F00009, Decision on the referral of Jakup Krasniqi concerning the legality 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 referral of Krasniqi and Veseli*”), para. 34. See also 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. 61; 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 (“*Decision on the referral of Driton Lajci*”), para. 14.

in the Constitution".¹¹ Accordingly, the Chamber finds that the Referral is to be considered under Article 33(1) of the Constitution and Article 6 of the Convention.¹²

11. However, before the Chamber can examine the Referral on the merits, it must first ascertain whether it is admissible.¹³ The Chamber thus turns to the assessment of certain admissibility requirements provided for in the Constitution, the Law and the SCCC Rules, which arise in the present proceedings.

B. WHETHER THE APPLICANTS' COMPLAINTS CAN BE CONSIDERED BY THE CHAMBER

12. The Chamber recalls that, pursuant to Article 113(7) of the Constitution and Article 49(3) of the Law, individuals are authorised to refer to the Chamber alleged violations of their individual rights and freedoms guaranteed by the Constitution after the exhaustion of all remedies provided by law.

13. The Chamber further recalls that Article 113(2)(1) of the Constitution does not include individuals within the category of those authorised to refer questions of constitutional compatibility of laws to the Constitutional Court. Article 49(5) of the Law, in turn, provides that the SC's Ombudsperson and the Ombudsperson of Kosovo may make such referrals.

(a) The Submissions

14. The Applicants contend that the 2024 Legal Aid Regulations, which have reduced the overall fee available to Counsel in the event an accused charged with offences against the administration of justice is found to be indigent, is insufficient to compensate for the time required to represent that accused.¹⁴ The Applicants therefore

¹¹ Kosovo, Constitutional Court, *Constitutional review of judgments [A.A.U.ZH. no. 20/2019 of 30 October 2019; and A.A.U.ZH. no. 21/2019, of 5 November 2019] of the Supreme Court of the Republic of Kosovo*, KI 207/19, Judgment, 10 December 2020 (5 January 2021), para. 111.

¹² *Decision on referral of Krasniqi and Veseli*, para. 35; *Decision on the referral of Driton Lajci*, para. 15.

¹³ See *Decision on referral of Krasniqi and Veseli*, para. 36, see also *Decision concerning a decision of the single judge*, para. 37.

¹⁴ Referral, paras 46-57, 74. See also Referral, paras 32-45, 58-73, 75-83, 85.

submit that the 2024 Legal Aid Regulations are incompatible with Articles 30 and 31 of the Constitution and Article 6 of the ECHR, that the entire legislative instrument lacks constitutional validity from the date of its entry into force and that it shall cease to have effect pursuant to Rules 29 of the SCCC Rules.¹⁵ The Applicants further request that the Chamber order the suspension of the 2024 Legal Aid Regulations as an interim measure until proceedings against the Applicants have concluded or a decision on the Referral is issued.¹⁶

15. The Applicants assert that they have exhausted all remedies, because a referral to the Chamber regarding the 2024 Legal Aid Regulations is the only remedy available to them in this instance.¹⁷

(b) The Chamber's Assessment

16. The Chamber notes at the outset that the 2024 Legal Aid Regulations provide for avenues through which the Applicants can challenge any determination made by the Registrar in relation to the disbursement of legal aid.¹⁸ The Chamber recalls in this respect that, pursuant to Article 113(7) of the Constitution, as well as Article 49(3) of the Law and Rule 20(1)(a) of the SCCC Rules, an individual may only make a referral to the Chamber after exhaustion of all effective remedies provided for by law against the alleged violation. The Chamber observes in this regard that the Applicants do not appear, as of yet, to have either requested legal aid, nor has there been a determination on their indigency. In other words, the Applicants did not allege that any specific decision was taken pursuant to the 2024 Legal Aid Regulations, or that any such decision violated any of their rights as such.

17. Rather, the Applicants request that the 2024 Legal Aid Regulations, in their

¹⁵ Referral, paras 3, 84.

¹⁶ Referral, para. 89. See also Referral, paras 86-88, 90-91.

¹⁷ Referral, para. 93. See also Referral, paras 92, 94.

¹⁸ See Regulations 9(4) and 10 of the 2024 Legal Aid Regulations.

entirety, be declared incompatible with the Constitution *in abstracto* by invoking Rule 29 of the SCCC Rules. In other words, the Applicants do not appear to rely on Article 113(7) of the Constitution, but are seeking to use Rule 29 of the SCCC Rules as a basis upon which to refer a general question of constitutional compatibility of a regulation to the Chamber.

18. The Kosovo Constitutional Court has held that “only entities that are explicitly mentioned in Articles 113(2) to 113(6) of the Constitution are authorised parties to refer [...] matters of abstract constitutional review.”¹⁹ This principle is also reflected in Article 49(2) and (5) of the Law, which does not include individuals within this category. The Chamber accordingly concludes that the Constitution does not provide an individual the right to challenge *in abstracto* the compatibility of a law. Lastly, Rule 29 of the SCCC Rules does not provide a legal basis for an individual referral, but states what effect a legislative provision has once declared incompatible with the Constitution. This however requires a judgment on the substantive nature of such legislative provision, which may only be entered if the Chamber has jurisdiction and the referral has been declared admissible.

19. Consequently, the Chamber need not assess the nature of the 2024 Legal Aid Regulations for the purpose of a constitutional review.

20. The Chamber further notes that the proceedings against the Applicant are ongoing and that it falls in the first place to the criminal chambers to assess whether there is any merit to the alleged violations and whether this can or should be remedied in the course of the proceedings.²⁰ In this respect, the Chamber notes that the 2024

¹⁹ Kosovo Constitutional Court, Constitutional review of the Administrative Instruction No. 11/2010, on Basic Pension Payments, issued by the Ministry of Labor and Social Welfare in October 2010, KI 40/11, Resolution on inadmissibility, 23 September 2011 (1 November 2011), para. 21.

²⁰ See, e.g., KSC-CC-2022-18, 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, para. 19.

Legal Aid Regulations provide for a review mechanism for any decision on legal aid by a competent panel.²¹

21. Accordingly, the Referral must be declared inadmissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 14(f) of the SCCC Rules as upon a prima facie review, nothing in the referral currently gives rise to the appearance of a violation of the Applicants' constitutional rights.

C. REQUEST FOR LEAVE TO APPEAR AS AMICUS CURIAE, REQUEST FOR JOINDER, AND INTERIM MEASURES

22. Given that the Chamber has determined the Referral inadmissible, the ADC-ICT Request, the Request for Joinder, and the Applicants' request for interim measures are both rendered moot.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

1. *Declares* the Referral inadmissible;
2. *Dismisses* the Referral of Sabit Januzi, Ismet Bahtijari and Haxhi Shala in its entirety; and
3. *Dismisses* the ADC-ICT Request and the Request for Joinder as moot.



Vidar Stensland
Presiding Judge

Done in English on Wednesday, 24 April 2024
At The Hague, the Netherlands

²¹ See Regulation 10 of the 2024 Legal Aid Regulations.