

In: KSC-CC-2024-27
The Specialist Prosecutor v. Mr. Salih Mustafa

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

Registrar: Fidelma Donlon
Filing Participant: Specialist Counsel for Salih Mustafa
Date: 13 October 2024
Language: English
Classification: Public

**Mustafa's Response to Victims' Counsel's request for leave to make submission
to Mustafa's Constitutional Court Referral**

Specialist Prosecutor's Office:
Kimberly P. West

Specialist Counsel
Julius von Bóné

Victims' Counsel
Dr Anni Pues

I INTRODUCTION

1. On 9 October 2024 the Victims' Counsel filed a Request¹ ("Request") for leave to make submission to Mustafa's Constitutional Court Referral.
2. In the present document Mustafa responds to the Victims' Counsel's request for leave to make submission to Mustafa's Constitutional Court Referral. In order to avoid that by not responding to it, it would possibly appear or mean that Mustafa would have no objection to the Request, or would agree with the Request of the Victims' Counsel. No such is the case.

II PROCEDURAL BACKGROUND

3. On 27 of September 2024, Mustafa filed a Referral to the Specialist Chamber of the Constitutional Court.² ("SCCC").
4. On 9 October 2024 the Victims' Counsel filed a Request for leave to make submission to Mustafa's Constitutional Court Referral.³
5. The Victims' Counsel does not base its Request on any express and explicit Article of the Law nor on any express and explicit Rule.

¹ KSC-CC-2024-27/F00005; Victims' Counsel's request for leave to make submission to Mustafa's Constitutional Court Referral.

² KSC-CC-2024-27/ F00001; Referral to the Constitutional Court Panel concerning violations of Mr. Salih Mustafa's fundamental rights guaranteed under Articles 22, 31 and 33 of the Constitution of the Republic of Kosovo and Articles 6 and 7 of the European Convention on Human Rights ("Referral").

³ KSC-CC-2024-27/F00005; Victims' Counsel's request for leave to make submission to Mustafa's Constitutional Court Referral.

6. Earlier on, on 20 September 2024 the Victims' Counsel filed (with the SPO) a Joint Request ("Joint Request") for extension of time.⁴ This Joint Request was made under Article 49 of the Law, following a Supreme Court Decision.⁵ Victims' Counsel requested an extension of time to file a referral to the SCCC.
7. In the Joint Request the Victims' Counsel specified that: *"the Supreme Court Decision was final in respect of certain findings concerning the criminal law applicable to sentencing"*.⁶
8. Furthermore, the Joint Request, specified that: *"the Request is without prejudice to the chambers consideration of the admissibility and merits of any application(s) or referral (s) ultimately made"*.⁷
9. The SCCC decided on the Joint Request in its Decision of 25 September 2024.⁸
10. In its Decision, the SCCC recalled that: *"the SPO and Victims' Counsel contend that different deadlines to them for the filing of a referral before the SCCC in relation to the Supreme Court Panel Decision and the ensuing Court of Appeals Decision, resulting in a reduction of Mr. Mustafa's sentence of imprisonment to 15 years"*.⁹
11. In its Decision the SCCC considered: *"Without prejudice to any finding by the SCCC in relation to the standing of either the SPO or Victims' Counsel to file a referral in relation to the Supreme Court Decision or the Court of Appeals Panel Decision, or the admissibility of any such referral, the*

⁴ KSC-CC-2024-26/F00001, Joint request for extension of time ("Joint Request"); Joint with the SPO.

⁵ KSC-SC-2024-02/F00018, Decision on Salih Mustafa's Request for Protection of Legality, 29 July 2024.

⁶ KSC-CC-2024-26/F00001, Joint request for extension of time ("Joint Request"), paragraph 2; further referring to KSC-SC-2024-02/F00018, Decision on Salih Mustafa's Request for Protection of Legality, 29 July 2024, paragraphs 99-108 and para. 111

⁷ KSC-CC-2024-26/F00001, Joint request for extension of time ("Joint Request"), paragraph 3 referring to footnote 9.

⁸ KSC-CC-2024-26/ F00003, Decision on Joint Request for Extension of Time.

⁹ KSC-CC-2024-26/ F00003, Decision on Joint Request for Extension of Time, paragraph 7, referring to the Joint Request paragraphs 1-3.

SCCC notes that it is clear from the wording of Article 49 of the Law that any time lines applicable to the filing of referrals by those authorised to do so are inherently specific or individual in nature, including in relation to any potential arguments that may be raised”.¹⁰ The SCCC rejected the Joint Request in its entirety.

III. SUBMISSIONS

12. The Victims’ Counsel can make referrals under Article 49 (3)¹¹ of the Law in their own right.
13. Neither Mustafa nor his Counsel was included in the distribution list of the Joint Request. In any event, Victims’ Counsel is aware of the Referral made by Mustafa.
14. Mustafa submits that the Victims’ Counsel did not file any referral at all to the SCCC within the time limit prescribed for in the Law. Irrespective of whether the Victims’ Counsel would have standing to file such a referral, the Victims’ Counsel did not file any further referral after the Decision on Joint Request, even though the time limit for filing such referral had not yet expired.
15. Victims hold individual rights under the Law and are protected by the Constitution. It is recognised under provision of Article 49 (3) of the Law, which afford victims a direct right to launch constitutional complaints. These complaints must concern their (i.e. the victims) *own* individual rights and freedoms, but only after exhaustion of all remedies provided by Law.¹²

¹⁰ Ibid, paragraph 9

¹¹ The Victims’ Counsel can file a referral under Article 49 (3) of the Law. The SPO can file a referral under Article 49 (2) of the Law. In the Joint Request the subparagraph of Article 49 was not specified

¹² See Article 49 (3) of the Law L05/L053 Law on Specialist Chambers and Specialist Prosecutor’s Office (KSC Law).

16. Neither Victims nor their Counsel on behalf of them, launched any referral anymore to the Constitutional Court. If any of the victims' individual rights and freedoms had been violated, than victims could have made a referral, provided that they had exhausted all remedies provided by law.
17. Therefore, the Victims have forfeited their own right under Article 49 (3) of the Law.
18. Mustafa's Referral is equally based on Article 49 (3) of the Law. It concerns *his own individual* rights and freedoms guaranteed by the Constitution. The object and purpose of that article is that he has his own possibility to challenge decision if he believes that any of his own constitutional rights have been violated.
19. Mustafa's individual Referral is not meant to be as an additional or separate avenue for victims, or any other party, to make comments on Mustafa's Referral, including making submissions to it. It would in fact create 2 options for any other party to make submissions about something that does not concern their *own* individual rights under Article 49 (3) of the Law.
20. As stated above the victims did not file any referral anymore. It would be unfair to Mustafa to grant Victims Counsel's Request, as failure to comply with time limits prescribed in the Law could be circumvented in this manner. Granting the Request of the victims would, in the view of Mustafa, create an imbalance in the proceedings and interfere with the integrity of it. In addition, it would set a precedent for parties to act in proceedings which are not meant for them. It opens the door for any kind of additional path to ventilate any kind of submissions under the umbrella of alleged infringements of victims' rights, even though victims have their own legal avenues within the Law.

Granting the Request would violate Mustafa's constitutional rights of equal protections of rights in proceedings (Article 31 (1) of the Constitution). Mustafa must be able to rely on the fact that no other party made any referral.

21. Victims further contend that, according to Article 23 (1) of the Law the Court has an obligation to safeguard victims' wellbeing at all stages of the proceedings. Article 23 (1), however, has a different object and purpose. As the title of the article indicates, it is about protection of victims and witnesses and sets out specific provisions in various articles of the Kosovo Criminal Law as well as in the Rules of Procedure and Evidence. Article 23 (1) can not be used as an umbrella for unwarranted possibility without legal bases, to complain, or to make submissions of an Accused who simply uses the legal options provided to him under the Law and Constitution.
22. One cannot say that it would "*hollow out*"¹³ the purpose of Article 22 (3) of the Law. Victims could have safeguarded their own rights through Article 49 (3) of the Law, that is by making their own referral, but simply did not do so.
23. An accused shall, under Article 31(1) of the Constitution be guaranteed equal protection of rights in the proceedings. Victims cannot be given additional procedural rights if they do not - for whatever reason - use their own rights as provided for in the Law.
24. Mustafa submits that the Request seeks that the SCCC would use powers for purposes other than those for which they were intended. In particular, to apply provision of the Law for which those are not meant, and are even outside the Law and the Rules. The Request by itself initiates proceedings that are simply not provided for in the Law or the Rules.

¹³ KSC-CC-2024-27/F00005; Victims' Counsel's request for leave to make submission to Mustafa's Constitutional Court Referral, paragraph 5

25. Granting the Request would create an unequal precedent, as for the equal rights in proceedings.
26. Victims' Counsel contends that Mustafa's Referral attacks the scope of victim's participation.¹⁴ The Victims' Counsel is wrong as Mustafa simply challenges a Decision of the Supreme Court and he alleges in his Referral that there has been a violation of his own constitutional rights under Article 102 (3) and 31 (1) (2) of the Constitution and of Article 6 of the European Court of Human Rights.
27. Lastly, Mustafa submits that the submissions of the victims regarding the "nature of his Referral" and "fairness of the issues raised" by Mustafa¹⁵ should be disregarded as an opinion or as unsolicited submissions.

IV CONCLUSION

28. For the reasons given above, Mustafa submits that the Victims' Counsel's Request should be rejected.

Word count: 1728



Julius von Bóné

Specialist Counsel

13 October 2024

At The Hague, the Netherlands

¹⁴ KSC-CC-2024-27/F00005; Victims' Counsel's request for leave to make submission to Mustafa's Constitutional Court Referral, paragraph 6

¹⁵ Ibid, paragraph 8 and 9