



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**File number:** KSC-CC-2019-05

**Before:** **The Specialist Chamber of the Constitutional Court**  
Judge Ann Power-Forde, Presiding  
Judge Vidar Stensland  
Judge Roland Dekkers

**Registrar:** Dr Fidelma Donlon

**Date:** 25 January 2019

**Copy:** **Petitioner**  
Mr Mahir Hasani

**PUBLIC**

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**Prosecution response to Mr Mahir Hasani's request for interim measures**

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## Introduction

1. The request by Mr Mahir Hasani ('Petitioner') for interim measures under Rule 21 of the Rules,<sup>1</sup> as contained in the Referral,<sup>2</sup> ('Request') should be denied. No *prima facie* showing of admissibility has been made and no risk of serious and irreparable harm arises.

## Procedural History

2. On 20 December 2018, the Specialist Prosecutor's Office ('SPO') issued to the Petitioner: (i) a summons to appear for questioning by the SPO in The Hague on 11 February 2019 ('Summons'); and (ii) an order to produce documents and records before the SPO in The Hague on 11 February 2019 ('Order'). The Summons and Order were served on the Petitioner that same day.

3. On 15 January 2019, the Petitioner filed the Referral before the Specialist Chamber of the Constitutional Court, seeking, *inter alia*, interim measures suspending the Order pending a determination on the admissibility and merits of the Referral. Both the Referral and Request relate solely to the Order, and not the Summons.<sup>3</sup>

4. That same day, the President of the Specialist Chambers issued a decision, pursuant to Article 33(3) of the Law, assigning a Constitutional Court Panel to rule on the Referral ('Panel').<sup>4</sup>

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<sup>1</sup> Rules of Procedure for the Specialist Chamber of the Constitutional Court, KSC-BD-03/Rev1/2017, 21 July 2017 ('Rules').

<sup>2</sup> Petition by Mr Mahir Hasani on the Violation of his Fundamental Rights by the Specialist Prosecutor's Office through the Issuance of Order VIY689, Dated 20 December 2018, To Produce Documents and Records and Request for Interim Measures, KSC-CC-2019-05/F00001, filed on 15 January 2019, with three confidential annexes ('Referral'). An English translation of the Referral was distributed on 18 January 2019 (KSC-CC-2019-05/F00001/eng).

<sup>3</sup> Referral, KSC-CC-2019-05/F00001/eng, p.5.

<sup>4</sup> Decision to Assign Judges to a Constitutional Court Panel, KSC-CC-2019-05/F00002, 15 January 2019. A corrigendum was filed on 21 January 2018, KSC-CC-2019-05/F00002/COR. 'Panel' is used in this response to encompass both the assigned Constitutional Court Panel and the Presiding Judge of the Panel, in exercising her powers under Rule 21 of the Rules.

5. On 18 January 2019, the Panel invited the SPO to file any submissions in relation to the Request on or before 25 January 2019.<sup>5</sup> The Panel, additionally, in respect of proceedings relating to the Referral: (i) invoked a change of venue to the Host State;<sup>6</sup> and (ii) designated English and Albanian as the working languages.<sup>7</sup>

### Submissions

6. Interim measures should only be granted in exceptional circumstances and where serious and irreparable harm would otherwise result.<sup>8</sup>

7. Before bringing a matter to the Specialist Chamber of the Constitutional Court, a Petitioner is required to exhaust the remedies available under the legal framework of the Specialist Chambers, including, as necessary, bringing it before a Single Judge. Where, as in the present case, it is apparent on *prima facie* review that a referral is premature, and therefore inadmissible, interim measures should not be granted.<sup>9</sup> This

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<sup>5</sup> Notice Regarding Replying Submissions, KSC-CC-2019-05/F00003, 18 January 2019 ('Notice').

<sup>6</sup> Invocation of Change of Venue, KSC-CC-2019-05-F00004, 18 January 2019, notified on 21 January 2019.

<sup>7</sup> Decision on the Working Languages, KSC-CC-2019-05/F00005, 18 January 2019, notified on 21 January 2019.

<sup>8</sup> Constitution of the Republic of Kosovo ('Constitution'), Art.116(2) ('[w]hile a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action [...] if the Court finds that application of the contested action [...] would result in unrecoverable damages'); Rules, Rule 21(1) (requiring a determination that the individual faces a 'real risk of serious harm if the interim measures were not granted'). See *similarly*, in respect of Rule 39 (Interim Measures) of the Rules of Court of the European Court of Human Rights ('ECtHR'), *Kasymakhunov v. Russia*, no.29604/12, 14 November 2013, para.181 ('[t]he crucial significance of interim measures is further highlighted by the fact that the Court issues them, as a matter of principle, only in truly exceptional cases and on the basis of a rigorous examination of all the relevant circumstances. In most of these cases, the applicants face a genuine threat to life and limb, with the ensuing real risk of grave, irreversible harm in breach of the core provisions of the Convention').

<sup>9</sup> See *similarly*, Rule 55(4)(a) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo ('the Review Panel [...] must find that: (a) the party requesting the interim measures has shown a *prima facie* case on the merits of the referral and, if admissibility has not yet been determined, a *prima facie* case on the admissibility of the referral'); Constitutional Court of the Republic of Kosovo ('CCK'), Case No. KI06/15, *Applicant Sadik Abazi*, Resolution on Inadmissibility, 26 August 2016, para.47 ('the Applicant has not shown a *prima facie* case on the admissibility of the Referral. Therefore, the request for interim measures is to be rejected as ungrounded'); CCK, Case No. KI 17/13, *Applicant Bujar Bukoshi*, Decision on the Request for Interim Measures, 14 March 2013 (rejecting a request for interim measures where the referral was premature); CCK, Case No. KI 102/16, *Applicant Shefqet Berisha*, Resolution on Inadmissibility, 2 March 2017, para.46 (similarly rejecting a request for interim measures where the referral was premature).

requirement prevents what should be an exceptional tool for avoiding imminent and serious violations from becoming a means of delaying proceedings even where the underlying referral is manifestly inadmissible or ill-founded.

8. No risk of serious and irreparable harm exists here. Indeed, no violation of the rights of the Petitioner has occurred or would occur were the Request not granted. Contrary to the Petitioner's submissions, which deliberately conflate language contained in the Summons with that in the Order,<sup>10</sup> the Petitioner is not and will not be subject to any threat of sanction. He has the opportunity to make a free decision, with the benefit of independent legal advice, regarding exercise of his right against self-incrimination. The matter may then, if necessary, be brought before a Pre-Trial or Single Judge for a ruling on the scope of that right. No compulsion in respect of the Order will take place without judicial oversight.

9. Consistent with the Panel's direction,<sup>11</sup> the SPO has confined its submissions in this response to the Petitioner's request for interim measures (i.e. the Request). In the event that the Referral is not rejected on the basis of being *prima facie* inadmissible, the SPO respectfully requests the opportunity to make further submissions on its admissibility and merits.

I. No *prima facie* showing of admissibility has been made

10. The Constitutional Court decides only on matters referred to it in a legal manner by authorised parties.<sup>12</sup> Pursuant to Article 49(3) of the Law and Article 113(7) of the Constitution, individuals may only make referrals to the Constitutional Court after exhaustion of all remedies provided by law. The Rules further elaborate this requirement in setting out two pre-conditions for the filing of a referral by an individual before the Specialist Chamber of the Constitutional Court:

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<sup>10</sup> Referral, KSC-CC-2019-05/F00001/eng, pp.13, 19.

<sup>11</sup> Notice, KSC-CC-2019-05/F00003, para.5.

<sup>12</sup> Constitution, Art.113(1); Law, Art.49(2) and (3); Rules, Rules 4 and 20.

- (i) all effective remedies provided by law against the alleged violation must have been exhausted; and
- (ii) the referral must be filed within two months from the date of notification of the final ruling concerning the alleged violation.<sup>13</sup>

11. Neither of those requirements are met in the present case.

12. Contrary to the Petitioner's submissions,<sup>14</sup> the legal framework of the Specialist Chambers provides accessible and effective safeguards and remedies for precisely the type of alleged violations of the constitutional rights of suspects as are raised in the Referral. The fact that jurisprudence on the application of the framework has not yet been developed does not absolve the Petitioner from the obligation to pursue the remedies which are available.<sup>15</sup>

13. In particular, Article 39(1) and (3) of the Law and Rule 48(2) of the KSC Rules<sup>16</sup> enable any Party (which includes a suspect or Specialist Counsel)<sup>17</sup> to seek such orders as may be necessary for the purposes of the investigation or for the preparation and conduct of proceedings. These provisions were clearly designed to enable a Pre-Trial Judge, or Single Judge appointed pursuant to Articles 25(1)(f) and 33(2) of the Law, to address matters arising in the course of an investigation, including issues relating to the rights of suspects summonsed by the SPO, such as the Petitioner.

14. The effectiveness of these provisions is further bolstered by the Specialist Chambers' overarching obligation under Article 3(2) of the Law to adjudicate and

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<sup>13</sup> Rules, Rule 20(1).

<sup>14</sup> Referral, KSC-CC-2019-05/F00001/eng, pp.10, 14-15.

<sup>15</sup> See, for example, ECtHR, *Nagovitsyn and Nalgiyev v. Russia*, nos 27451/09 and 60650/09, 23 September 2010, para.30; ECtHR, *Ciupercescu v. Romania*, no. 35555/03, 15 June 2010, para.169.

<sup>16</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev1/2017, 5 July 2017 ('KSC Rules').

<sup>17</sup> See KSC Rules, Rule 2.

function in accordance with the Constitution and international human rights law, as the Specialist Chamber of the Constitutional Court has previously noted.<sup>18</sup>

15. The Petitioner has taken no steps to seek remedies pursuant to those provisions. If he were to do so, he would have the opportunity to have his arguments heard and adjudicated before a Pre-Trial or Single Judge in the ordinary course, including, where appropriate, seeking appellate review.<sup>19</sup> Consequently, the Petitioner has failed to exhaust all effective remedies provided by law in respect of the allegations raised.

16. Relatedly, it is apparent that no final ruling has been issued. Indeed, as noted above, the Petitioner has taken no steps to even seek a ruling from a Pre-Trial or Single Judge. Contrary to the Petitioner's submissions,<sup>20</sup> the Order itself cannot constitute a 'final ruling' within the meaning of Rule 20(1)(b) of the Rules, noting: (i) the existence, accessibility to the Petitioner and effectiveness of judicial remedies provided by law; and (ii) the fact that any future enforcement of the Order by the SPO would be by way of litigation seeking a ruling before the Specialist Chambers, as is indicated on the face of the Order.

17. Apart from the explicit exhaustion requirements specified above, the principle of subsidiarity and the interests of the proper administration of justice strongly favour allowing the regular judicial process to take its course.<sup>21</sup> The appropriate judicial

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<sup>18</sup> JUDGMENT on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, KSC-CC-PR-2017-01/F00004, 26 April 2017, para.11 ('[i]t is acknowledged that, in certain respects, the only way to ascertain, unequivocally, whether a provision in the Rules is in compliance with the Constitution would be to examine the manner in which the specific provision is applied in any given case. For the most part and subject to the guiding principles set out below, the Court places reliance upon the fact that when the Rules are to be interpreted and applied, regard will be had to Article 3(2)(a) and (e) of the Law'). See also paras 110 and 123 (specifically addressing Chapter 4 of the Rules).

<sup>19</sup> KSC Rules, Rule 77.

<sup>20</sup> Referral, KSC-CC-2019-05/F00001/eng, p.15.

<sup>21</sup> See, for example, CCK, Case No. KI 08/11, *Applicant Malush Sopa, Sedat Kuqi, Fazli Morina, Rrahman Kabashi and Liman Gashi*, Resolution on Inadmissibility, 24 April 2012, paras 46-49; CCK, Case No. KI 58/13, *Applicant Mr Sadik Bislimi*, Resolution on Inadmissibility, 25 November 2013, paras 28-32 ('every time a human rights violation is alleged, such an allegation cannot as a rule arrive to the Constitutional

authorities, beginning with a Pre-Trial or Single Judge, should be given the opportunity to exercise their powers of interpretation in developing the existing rights and remedies available to the Petitioner, and any future applicants.<sup>22</sup>

18. Merely asserting that no legal remedies exist, as the Petitioner has done in the Referral,<sup>23</sup> does not constitute a *prima facie* showing of admissibility. In the absence of such a showing interim measures should not be granted, and the Referral should be summarily dismissed.<sup>24</sup>

## II. No risk of serious and irreparable harm arises

19. Contrary to the Petitioner's submissions,<sup>25</sup> the Petitioner is not and will not be subject to any threat of sanction in making a free and informed decision on 11 February 2019 regarding invocation of his right against self-incrimination.<sup>26</sup> In the Referral, the Petitioner deliberately conflates language contained in the Summons with that in the Order, to argue that he is being threatened with imprisonment should he invoke a right against self-incrimination. That is not the case. Rather, the matter would be submitted to judicial process. Should the parties disagree on the scope of the right against self-incrimination in the context of production of documents, the SPO

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court without first being considered by the regular courts' (para.31)); CCK, Case No. KI 17/13, *Applicant Bujar Bukoshi*, Decision on the Request for Interim Measures, 14 March 2013, paras 27-28; CCK, Case No. KI 102/16, *Applicant Shefqet Berisha*, Resolution on Inadmissibility, 2 March 2017, paras 41-43; CCK, Case No. KI 23/10, *Applicant Jovica Gadžić*, Resolution on Inadmissibility, 19 September 2013, paras 47-49; CCK, Case No. KI 07/13, *Applicant Ibish Kastrati*, Resolution on Inadmissibility, 5 July 2013, paras 25-29.

<sup>22</sup> See, for example, ECtHR, *Ciupercescu v. Romania*, no. 35555/03, 15 June 2010, para.169.

<sup>23</sup> Referral, KSC-CC-2019-05/F00001/eng, pp.10, 14-15.

<sup>24</sup> Rules, Rule 14(d) (providing for the summary dismissal of referrals which are submitted out of time). Rule 20(a) of the Rules sets out the applicable timing for the making of referrals by individuals and, as indicated above, requires that a referral be made within two months after the issuance of a final ruling, following exhaustion of all effective remedies provided by law.

<sup>25</sup> Referral, KSC-CC-2019-05/F00001/eng, pp.13, 19.

<sup>26</sup> See, for example, ECtHR, GC, *Ibrahim and Others v. The United Kingdom*, nos 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para.267 (affirming that the right against self-incrimination does not protect against self-incrimination *per se*, but rather against improper compulsion in obtaining evidence which is subject to a self-incrimination protection. The nature and degree of any compulsion must be considered).

may, as is indicated in the Order, bring the matter before a Pre-Trial or Single Judge seeking enforcement. There, the Petitioner would have the opportunity to have his arguments heard and ruled upon, and, if necessary and following exhaustion of all other effective remedies, to bring any allegations regarding violation of his rights before the Specialist Chamber of the Constitutional Court. Thus, no threat of sanction arises in respect of invocation of his rights and no compulsion in respect of the Order will take place without judicial oversight.

20. Additionally, to ensure that the Petitioner could receive relevant legal advice in a timely manner, the Order advised him of his status and his right to the assistance of counsel,<sup>27</sup> and he was simultaneously provided with contact details for the Registry Defence Office. The very fact of the Referral demonstrates that the Petitioner has been able to effectively exercise his right to counsel, which in itself is a key procedural safeguard in respect of the right against self-incrimination.<sup>28</sup> Upon his appearance on 11 February 2019, the Petitioner will, in the ordinary course, be informed in full of his rights under Article 38(3) of the Law, including his right to silence and to not incriminate himself.

21. Further, interim measures are not required to address any theoretical future harm that could arise were the SPO to, in due course, issue an indictment against the Petitioner and seek to use documents obtained pursuant to the Order against him.<sup>29</sup> Not only is that scenario highly speculative at this time but many levels of judicial oversight will occur prior to such an event. Moreover, should such circumstances nonetheless ultimately occur and the attempted use of the documents in that manner

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<sup>27</sup> KSC Rules, Rule 43(3).

<sup>28</sup> See, for example, ECtHR, GC, *Salduz v. Turkey*, no.36391/02, 27 November 2008, para.54 ('[e]arly access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination').

<sup>29</sup> *Contra* Referral, KSC-CC-2019-05/F00001/eng, pp.21-24.



be found in violation of the Petitioner's right against self-incrimination, any potential harm arising could be remedied by an order excluding the documents from evidence.

22. Consequently, there is no risk of serious harm arising to the Petitioner should the interim measures not be granted, and the Request should be denied.

### **Classification**

23. Consistent with the Referral and Notice, this response is filed as a public document. The SPO notes that the Referral contains certain of the Petitioner's contact details<sup>30</sup> which, in the interests of protecting his privacy and well-being, it may be appropriate to redact from any published version of that filing.

### **Relief Requested**

24. For the foregoing reasons, the Panel should:
- a. reject the Request; and
  - b. declare the Referral *prima facie* inadmissible or invite the SPO to make submissions on its admissibility and merits.



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**Jack Smith**

**Specialist Prosecutor**

Done in English, on 25 January 2019  
At The Hague, the Netherlands

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<sup>30</sup> See, for example, Referral, KSC-CC-2019-05/F00001/eng, p.5.