



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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: Fidelma Donlon

Date: 7 February 2019

Language: English

File name: Referral and Request for Interim Measures by Mahir Hasani
Concerning Prosecution Order of 20 December 2018

Classification: Public

Order on Request of Mahir Hasani for Interim Measure

Applicant

Mahir Hasani

Specialist Prosecutor

Jack Smith

The Specialist Chamber of the Constitutional Court

Composed of

Ann Power-Forde, Presiding Judge

Vidar Stensland, Judge

Roland Dekkers, Judge

Having deliberated in private on 25 and 26 January 2019, issues the following Order.

I. PROCEDURE

1. On 15 January 2019, Mr Mahir Hasani (the “Applicant”) lodged with the Specialist Chamber of the Constitutional Court (the “Chamber”) a referral, dated 11 January 2019 (the “Referral”),¹ under Article 113(7) of the Constitution of the Republic of Kosovo (the “Constitution”). The Applicant was represented by Dr Artan Qerkini.

2. In the Referral, the Applicant complained that an order of the Specialist Prosecutor’s Office (the “SPO”) directing him to provide documents and information (the “Order”) violated his rights to silence and against self-incrimination, and the presumption of innocence. The Applicant relied on Articles 30(6) and 31(5) of the Constitution and Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms (the “Convention”).

3. Further, the Applicant applied, pursuant to Rule 21(1) and (2) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (the “Rules”), for an order in the form of an interim measure suspending the aforementioned SPO Order,

¹ KSC-CC-2019-05, F00001, 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 measure, Public (redacted) with Confidential annexes, 11 January 2019.

pending a determination by the Chamber of the admissibility and merits of the Referral.

4. On 15 January 2019, the President of the Specialist Chambers, pursuant to Article 33(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (the "Law"), assigned the above Panel to rule on the Referral.²

5. On 18 January 2019, the Presiding Judge of the Specialist Chamber of the Constitutional Court invoked, pursuant to Article 3(8)(c) of the Law, a change in venue of the present proceedings to the Host State, namely, the Netherlands.³ The same day, the Panel decided, pursuant to Article 20 of the Law, that the working languages of the present proceedings shall be Albanian and English with official translation or interpretation provided by the Registry into the official languages of the Specialist Chambers, namely, Albanian, Serbian and English.⁴

6. On 18 January 2019, the Chamber gave notice to the Specialist Prosecutor regarding replying submissions.⁵ It allowed the Specialist Prosecutor to file, by 25 January 2019, replying submissions, should he wish so to do, in relation to the Applicant's request for an interim measure.

7. On 22 January 2019, the President of the Specialist Chambers issued a decision to locate the present proceedings to the Host State.⁶

8. On 25 January 2019, the Specialist Prosecutor filed his replying submissions in relation to the Applicant's request for the interim measure.⁷

² KSC-CC-2019-05, F00002, Decision to assign Judges to a Constitutional Court Panel, Public, 15 January 2019.

³ KSC-CC-2019-05, F00004, Invocation of change of venue, Public, 18 January 2019.

⁴ KSC-CC-2019-05, F00005, Decision on the working languages, Public, 18 January 2019.

⁵ KSC-CC-2019-05, F00003, Notice regarding replying submissions, Public, 18 January 2019.

⁶ KSC-CC-2019-06, F00002, Decision on the location of proceedings before the Specialist Chamber of the Constitutional Court, Public, 22 January 2019.

⁷ KSC-CC-2019-05, F00008, Prosecution response to Mr Mahir Hasani's request for interim measures, Public, 25 January 2019.

II. THE FACTS

9. On 20 December 2018, the SPO served on the Applicant two documents, namely, a summons to appear for questioning on 11 February 2019 (the “Summons”) and the Order to provide certain documents and information to the SPO on the same day.

10. In the Order, the SPO stated that the Applicant was “obligated to produce” all documents, data, notes and information as specified in the Order and was warned that a failure to produce the documents shall be considered “contempt”⁸ which, as a result thereof, the SPO may request the Specialist Chambers to undertake measures that enforce compliance with the Order.

11. The Order also stated that there were “reasons to believe that [the Applicant] [had] been involved in the commission of a crime within the jurisdiction of the Kosovo Specialist Chambers [...]”.⁹

12. The Summons stated that the Applicant was “obligated to appear”¹⁰ for questioning. The Summons further indicated that in the event of the Applicant’s failure to appear he could “be compelled to appear, fined and imprisoned”.¹¹

III. SUBMISSIONS

A. THE APPLICANT

13. The Applicant submitted that the SPO Order had confirmed that there was a suspicion against the Applicant that he had been involved in the commission of a crime within the jurisdiction of the Kosovo Specialist Chambers. At the same time, the Order obliged the Applicant to provide all documents and information specified therein. The SPO had not informed the Applicant of the details of the suspicion against

⁸ KSC-CC-2019-05, F00001, A03, Annex 3, Confidential.

⁹ Ibid.

¹⁰ KSC-CC-2019-05, F00001, A02, Annex 2, Confidential.

¹¹ Ibid.

him. Therefore, he submitted, that he, the Applicant, could find himself in a situation where, having provided documents and information to the SPO, such material could, subsequently, harm his defence and give the Specialist Prosecutor an unacceptable advantage in the event that he were charged with the commission of an offence.

14. In that light, the Applicant submitted that as a result of such compulsion to produce documents and information, which violates his right to silence and the privilege against self-incrimination, there is a real risk of serious harm to his fundamental rights under Articles 30(6) and 31(5) of the Constitution and Article 6(2) of the Convention. The Order obliges the Applicant to provide the SPO with the documents and information and therefore he, as a suspect, must comply with the Order.

B. THE SPECIALIST PROSECUTOR

15. The Specialist Prosecutor submitted that the Chamber should not grant the interim measure. A scenario that the Applicant would be indicted and the documents used against him was speculative at this time. Interim measures were not required to address any theoretical future harm that could arise. Furthermore, the SPO will not subject the Applicant to any threat of sanction in making a free and informed decision on 11 February 2019. Upon his appearance on that day, the SPO will inform the Applicant of his rights under Article 38(3) of the Law, including, the right to silence and to not incriminate himself. Therefore, there was no real risk of serious harm.

16. Furthermore, the Chamber could not order the interim measure since the Referral was *prima facie* inadmissible. The Law provides for many levels of judicial oversight in relation to the matters raised in the Referral, such as, review by a Single Judge or Pre-Trial Judge, assigned pursuant to Article 33 of the Law. The Applicant had not exhausted these remedies.

IV. ASSESSMENT

A. JURISDICTION

17. Before the Chamber proceeds to deal with the Applicant's request for an interim measure and, notwithstanding the urgency of the matter, it is appropriate to address, briefly, the question of jurisdiction.

18. The Applicant made the Referral under Article 113(7) of the Constitution. The Referral concerns the SPO Order. On its face, the Referral relates to the Specialist Chambers and Specialist Prosecutor's Office, as required by Article 162(3) of the Constitution, and Articles 3(1) and 49(2) of the Law. The Chamber is satisfied that, *prima facie*, it has jurisdiction to decide on the Referral. Consequently, the Chamber has jurisdiction to decide on the interim measure.

B. INTERIM MEASURE

19. Turning to the Applicant's request for an interim measure, the Chamber notes first that the Applicant has fulfilled the requirements set out in Rule 21(2) of the Rules.

20. The Chamber further recalls that in accordance with Rule 21(1) of the Rules an interim measure may be ordered where the individual faces "a real risk of serious harm" if the interim measure were not granted. In this connection, the Chamber notes that Article 116(2) of the Constitution provides for a similar condition under which the Constitutional Court of Kosovo may apply an interim measure, in particular, where the contested action would result in "unrecoverable damages".

21. Under the Convention system, Rule 39 of the ECtHR Rules provides for a possibility for the Court to indicate an interim measure. The Rule does not set out the grounds upon which an interim measure may be indicated.¹² Where Article 6 is

¹² See ECtHR, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, para. 104.

engaged, the Strasbourg Court's practice is to apply Rule 39 (that is, to grant an interim measure) in circumstances where a person risks suffering a "*flagrant denial of justice*" in the event of expulsion or extradition.¹³

22. As regards the existence of "a real risk of serious harm" under Rule 21(1) of the Rules, the Applicant submits that, if the Chamber does not suspend the SPO Order directing him to provide documents on 11 February 2019, the harm he faces is threefold. In the event that his status changes from that of a suspect to an accused, (i) his defence would be harmed and (ii) the Prosecution would gain an unfair advantage. In the event that he refuses to provide the documents, (iii) he will be held in contempt with potential enforcement measures taken — according to the terms of the Order.

23. The Specialist Prosecutor disputes the Applicant's submissions (see paragraphs 15-16 above).

24. The Chamber has not, to date, had an opportunity to develop its jurisprudence on what constitutes a 'real risk of serious harm' in deciding whether to grant a request for an interim measure. It is mindful of the 'flagrant denial of justice' test articulated by the Strasbourg Court. Whilst the Chamber considers that the Specialist Prosecutor's submission that the Applicant will be informed of his rights to silence and to not incriminate himself, carries some weight, it, nevertheless, at this point in time, finds it difficult to reconcile that submission with the terms of the 'Order' which *obligates* the Applicant to provide all specified documents and information when he appears for questioning on 11 February 2019.

25. At this point, the Chamber considers that, on its face, the SPO Order is problematic in terms of the requirements of justice in so far as it constitutes an order

¹³ In this regard, see ECtHR, *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161; *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, ECHR 2012; *Ismoilov and Others v. Russia*, no. 2947/06, 24 April 2008.

to a confirmed suspect to produce material, which could, if complied with, cause serious harm to the Applicant, should his status change to that of an accused. If not complied with, it carries a warning that the Applicant's failure to produce the documents "shall be considered contempt".

26. The Chamber observes that the Order *obliges* the Applicant to produce the requested documents and information. It further observes that a warning has been issued to the Applicant to the effect that a failure to produce the documents shall be considered contempt arising from which enforcement measures may be initiated against the Applicant. Under the terms of the Order, the Applicant has no other choice but to comply with its directions and to provide the requested material if he wants to avoid a finding of contempt.

27. Having regard to the foregoing and bearing in mind the time constraints under which the request for an interim measure is made, the Chamber is prepared to accept that there is a real risk of serious harm in the event that the interim measure is not granted.

28. Therefore, in the very specific circumstances of this case, the Chamber decides to issue an interim measure suspending the SPO Order until such time as a ruling on the Referral is made or until further order.

29. The Chamber confirms that its Order granting this interim measure does no more than ensure that the *status quo* is maintained pending its determination of the Referral.

30. The Chamber confirms that this Order is without prejudice to its determination of the Referral, including, to any findings it may make on the admissibility and/or merits thereof.

31. The Chamber further confirms that this Order is without prejudice to the Applicant's obligation, pursuant to the Summons, to appear for questioning before the SPO on 11 February 2019.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

Suspends the Order of the Specialist Prosecutor's Office of 20 December 2018 in so far as it *obliges* the Applicant to provide the documents, data, notes and information specified in the Order, until such time as the Chamber decides on the Referral or until further order.



Judge Ann Power-Forde
Presiding Judge

Done in English on Thursday, 7 February 2019
At The Hague, the Netherlands.