



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:** 20 February 2019

**Language:** English

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

**Classification:** Public

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**Decision on the Referral of Mahir Hasani**  
**Concerning Prosecution Order of 20 December 2018**

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**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 both remotely and in person delivers the following Decision

### 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'),<sup>1</sup> 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

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<sup>1</sup> 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.

interim measure suspending the Order, 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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

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

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

8. On 25 January 2019, the Specialist Prosecutor filed his replying submissions in response to the Applicant's request for an interim measure.<sup>7</sup>

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

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

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

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

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

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

9. On 7 February 2019, the Chamber granted the Applicant's request for an interim measure. It suspended the SPO Order in so far as it '*oblige[d]*' the Applicant to provide the documents, data, notes and information specified in the Order [...].<sup>8</sup>

10. On 13 February 2019, the Chamber notified the Registrar that it would deliver its ruling on 20 February 2019.

11. On 15 February 2019, the Specialist Prosecutor filed a Notice of Withdrawal and Request for Dismissal of the Referral.<sup>9</sup>

## II. THE FACTS

12. 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.

13. In the Order, the SPO stated that the Applicant was 'obligated to produce' the documents and information as specified in the Order and was warned that a failure to produce the said documents 'shall be considered contempt',<sup>10</sup> as a result of which the SPO could 'request the Specialist Chambers to undertake measures that enforce compliance with this order'.<sup>11</sup>

14. 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 [...]'.<sup>12</sup>

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<sup>8</sup> KSC-CC-2019-05, F00010, Order on request of Mahir Hasani for interim measure, Public, 7 February 2019.

<sup>9</sup> KSC-CC-2019-05, F00011, Notice of withdrawal and request for dismissal of Mr Mahir Hasani's referral, Public, 15 February 2019.

<sup>10</sup> KSC-CC-2019-05, F00001, A03, Annex 3, Confidential.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

15. The Summons stated that the Applicant was 'obligated to appear'<sup>13</sup> for the 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'.<sup>14</sup>

### III. ALLEGED VIOLATIONS

16. The Applicant complained that the SPO Order directing him, as a suspect, to provide certain documents and information violated his rights to silence and against self-incrimination, under Article 30(6) of the Constitution. He further claimed that it violated his right to be presumed innocent, under Article 31(5) of the Constitution and Article 6(2) of the Convention. The Applicant did not complain about the Summons.

### IV. JURISDICTION

17. The Chamber is satisfied that it has jurisdiction to examine the Referral. It notes that Article 162(3) of the Constitution provides that '[a] Specialist Chamber of the Constitutional Court [...] shall [...] decide any constitutional referrals under Article 113 of the Constitution *relating* to the Specialist Chambers and Specialist Prosecutor's Office [...]'. (emphasis added) Also, Articles 3(1) and 49(2) of the Law provide for the Chamber's jurisdiction in respect of constitutional referrals which *relate* to the Specialist Chambers and Specialist Prosecutor's Office.

18. The present Referral was filed by the Applicant under Article 113(7) of the Constitution. In the Referral, the Applicant complained about the SPO Order. The Referral, therefore, *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. It follows that the Chamber has jurisdiction to rule on the Referral.

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<sup>13</sup> KSC-CC-2019-05, F00001, A02, Annex 2, Confidential.

<sup>14</sup> *Ibid.*

## V. ASSESSMENT

## A. SUBMISSIONS

**1. The Applicant**

19. Referring to the judgment of the European Court of Human Rights<sup>15</sup> in *John Murray v. the United Kingdom*, the Applicant submitted that, although not specifically mentioned in Article 6 of the Convention, the right to remain silent and the privilege against self-incrimination lie at the heart of the notion of a fair procedure under Article 6. These immunities provide an accused person with protection against improper compulsion by the authorities and contribute towards avoiding miscarriages of justice.<sup>16</sup> As held by the Strasbourg Court in *Heaney and McGuinness v. Ireland*, the right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.<sup>17</sup> It followed from *Heaney and McGuinness v. Ireland* that a threat and imposition of sanctions for failing to supply information to investigating authorities could constitute improper compulsion.<sup>18</sup> Furthermore, the right not to incriminate oneself was closely linked to the presumption of innocence contained in Article 6(2) of the Convention.<sup>19</sup> The Applicant claimed that the Order had breached both the privilege against self-incrimination and the presumption of innocence by seeking to shift the burden of proof.

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<sup>15</sup> In this regard, all case law citations in this Decision are references to the case law of the European Court of Human Rights (the 'ECtHR' or 'Strasbourg Court'), unless otherwise specified.

<sup>16</sup> *John Murray v. the United Kingdom*, 8 February 1996, Reports of Judgments and Decisions 1996-I, para. 45.

<sup>17</sup> *Heaney and McGuinness v. Ireland*, no. 34720/97, ECHR 2000-XII, para. 40. The Applicant referred also to *Saunders v. the United Kingdom*, 17 December 1996, Reports of Judgments and Decisions 1996-V, para. 68; *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009, para. 92.

<sup>18</sup> *Heaney and McGuinness v. Ireland*, cited above.

<sup>19</sup> *Ibid.*, para. 40. The Applicant referred also to *Saunders v. the United Kingdom*, cited above, para. 68.

20. In relation to his specific circumstances, the Applicant submitted that the SPO had sought to compel him, a confirmed suspect, to provide documents, data, notes and information. In particular, the Order had stated that his failure to produce the specified documents would be considered 'contempt' and that enforcement measures could be taken against him to ensure compliance with the Order. In addition, the Summons had referred to a fine and imprisonment. Furthermore, whilst informing the Applicant that he was under suspicion, the SPO had not informed him of the grounds for the suspicion against him. Therefore, the Applicant claimed that he could find himself in a situation in which any piece of information or document which he provided to the SPO could, subsequently, harm his defence and could give the Specialist Prosecutor an unacceptable advantage in the event that the Applicant were committed to stand trial.

21. Through such compelling terms of the Order, the SPO had sought to oblige the Applicant, whom the SPO regarded as a suspect, to produce evidence and, thereby, potentially, to incriminate himself. This involved a shifting of the burden of proof. Therefore, the Order violated the Applicant's rights under Articles 30(6) and 31(5) of the Constitution and Article 6(2) of the Convention. There was no legal remedy available to the Applicant under the Constitution, the Law or the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers to challenge the Order and address the alleged violations of the Applicant's constitutional rights. The Referral was, therefore, admissible.

## **2. The Specialist Prosecutor**

22. In reply to the Applicant's request for an interim measure, the Specialist Prosecutor, referring to the case law of the Constitutional Court of Kosovo,<sup>20</sup>

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<sup>20</sup> The Specialist Prosecutor referred to, for example, Kosovo, Constitutional Court, *Constitutional review of the Judgment of the Municipal Court of Ferizaj C No. 6/2008 of 5 November 2012, C No. 364/2009 of 19 December 2012 and the Ruling of the Basic Court in Ferizaj C No. 534/10 of 15 March 2013, KI 58/13, Resolution on inadmissibility, 16 October 2013 (25 November 2013), paras 28-32; Constitutional review of*

submitted that the principle of subsidiarity and the interests of the proper administration of justice strongly favoured allowing the regular judicial process to take its course. There were legal remedies available to the Applicant to address the alleged violations, such as, bringing the matters complained of before a Pre-Trial Judge or a Single Judge, assigned pursuant to Article 33 of the Law. Given that the Applicant had not exhausted these remedies, the Referral was inadmissible pursuant to Article 113(7) of the Constitution and Article 49(3) of the Law.

23. The Specialist Prosecutor also submitted that the Applicant's contention that the SPO could issue an indictment against the Applicant and use the documents and information obtained under the Order against him was highly speculative. In that event, it was contended that there were many levels of judicial oversight available and that the Applicant could also apply to have the impugned material excluded from the evidence. The Applicant's Referral was premature.

## B. THE CHAMBER'S ASSESSMENT

### 1. Preliminary Considerations on the Law

24. The Chamber recalls its supervisory duty to oversee the work of the Kosovo Specialist Chambers and Specialist Prosecutor's Office in so far as fundamental rights and freedoms guaranteed by the Constitution are concerned. Pursuant to Article 49(1) of the Law, the Chamber shall be the final authority for the interpretation of the Constitution as it relates to the subject matter jurisdiction and work of the Specialist Chambers and the Specialist Prosecutor's Office.

25. As regards the fundamental rights and freedoms guaranteed by Chapter II of the Constitution, Article 22(2) thereof provides for direct application of the Convention.

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*the Decision of the District Court in Prishtina, Ka No. 562/12 of 8 October 2012, KI 17/13, Decision on the request for interim measures, 14 March 2013, paras 27-28.*



Furthermore, pursuant to Article 53, human rights and fundamental freedoms guaranteed by the Constitution 'shall be interpreted consistent with the court decisions of the [ECtHR]'. The Constitutional Court of Kosovo has consistently recognised the application of Article 53 in its review of constitutional referrals.<sup>21</sup> It has also stated that 'the Constitutional Court *is bound* to interpret human rights and fundamental freedoms consistent with the court decisions of the [ECtHR]'.<sup>22</sup>

26. In that light, and given Articles 22(2) and 53 of the Constitution, this Chamber has particular regard to the case law of the Strasbourg Court in its review of the Applicant's complaint that the Order, directing him to produce documents and information, violated his constitutional rights to silence and to not incriminate himself. It also has regard to the Strasbourg Court's case law in its determination of the Specialist Prosecutor's request to dismiss the instant Referral.

## 2. Alleged Violations

27. The Applicant's Referral, essentially, relates to the right to silence and the right to not incriminate oneself, as guaranteed under Article 30(6) of the Constitution and Article 6(1) of the Convention. As held by the ECtHR in *Saunders v. the United Kingdom*, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right to not incriminate oneself are generally recognised international standards in criminal proceedings and lie at the heart of the notion of a fair procedure

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<sup>21</sup> See, for example, Kosovo, Constitutional Court, *Request for constitutional review of Judgment Pml No. 225/2017 of the Supreme Court, of 18 December 2017*, KI 34/18, Resolution on inadmissibility, 23 May 2018 (11 June 2018), para. 41. See also Kosovo, Constitutional Court, *Request for constitutional review of Judgment Pml No. 225/2017 of the Supreme Court of 18 December 2017*, KI 37/18, Resolution on inadmissibility, 30 May 2018 (11 June 2018), para. 37; *Constitutional review of Decision Pn II No. 1/17 of the Supreme Court of Kosovo of 30 January 2017 related to the Decision Pml No. 300/16 of the Supreme Court of 12 December 2016*, KI 62/17, Judgment, 29 May 2018 (11 June 2018), para. 43.

<sup>22</sup> Kosovo, Constitutional Court, *Constitutional review of Judgment Pml No. 181/15 of the Supreme Court of the Republic of Kosovo, of 6 November 2015*, KI 43/16, Resolution on inadmissibility, 14 April 2016 (16 May 2016), para. 50 (emphasis added). See also Kosovo, Constitutional Court, *Gëzim and Makfire Kastrati against Municipal Court in Prishtina and Kosovo Judicial Council*, KI 41/12, Judgment, 25 January 2013 (26 February 2013), para. 58.

under Article 6 of the Convention.<sup>23</sup> Such generally recognised standards are reflected, for example, in the European Union Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. By way of comparison, the Chamber notes that pursuant to Article 2, the Directive applies, *inter alia*, to suspects in criminal proceedings. Article 7 enshrines the right to silence and the privilege against self-incrimination.

28. The Applicant's Referral raised the question of whether the guarantees provided in Article 30 of the Constitution and Article 6 of the Convention apply during the investigative stage, and, particularly, to circumstances in which the authorities order a confirmed suspect to provide specified documents and information during the course of an interrogation.

(a) Applicability of Constitutional Guarantees When 'Subject to a Criminal Charge'

29. According to the ECtHR case law, the protections afforded by Article 6(1) and (3) of the Convention apply to a person who is *subject to a 'criminal charge'*.<sup>24</sup> Article 30 of the Constitution also sets out the minimum rights of a person '*charged with a criminal offense*'.<sup>25</sup> The Strasbourg Court, in its case law, takes a substantive, rather than a formal approach to the question of when a person may be considered as being subject to a criminal charge.

30. In particular, it has confirmed that a 'criminal charge' exists from the moment that a person is officially notified by the competent authority of an allegation that he or she has committed a criminal offence, or from the point at which his or her situation

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<sup>23</sup> *Saunders v. the United Kingdom*, cited above, para. 68.

<sup>24</sup> *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017, para. 110 (emphasis added). See also *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016, para. 249.

<sup>25</sup> Article 30 of the Constitution reads, in its relevant part, as follows: 'Everyone *charged with a criminal offense* shall enjoy the following minimum rights: [...]' (emphasis added).

has been substantially affected by actions taken by the authorities on foot of a suspicion against him or her.<sup>26</sup>

31. In view of the complaints filed by the Applicant, the Strasbourg Court's judgment in *Aleksandr Zaichenko v. Russia*,<sup>27</sup> as subsequently endorsed in *Ibrahim and Others v. the United Kingdom*,<sup>28</sup> is of particular relevance. In the former case, the ECtHR regarded a suspect who was questioned about his involvement in acts constituting a criminal offence as being subject to a 'charge' for the purposes of Article 6 of the Convention. It explained that once there was a suspicion of theft against the applicant, it became incumbent on the police to inform him of his right to silence and of the privilege against self-incrimination.<sup>29</sup>

32. In the present case, the SPO Order, as issued, had confirmed to the Applicant that there were reasons to believe that he had been involved in the commission of a crime within the jurisdiction of the Kosovo Specialist Chambers.<sup>30</sup> Given that the Order had clearly confirmed the existence of a suspicion against the Applicant, the Chamber accepts that Article 30 of the Constitution and Article 6 of the Convention were engaged and were applicable to the Applicant, more particularly, the right to silence and the privilege against self-incrimination.

(b) The Right to Silence and the Privilege Against Self-Incrimination

33. The Chamber recalls that the purpose of the right to silence and the privilege against self-incrimination is to protect an accused person against improper compulsion by the authorities and thereby to avoid a miscarriage of justice and to

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<sup>26</sup> See, for example, *Ibrahim and Others v. the United Kingdom* [GC], cited above, paras 249, 253.

<sup>27</sup> *Aleksandr Zaichenko v. Russia*, no. 39660/02, 18 February 2010.

<sup>28</sup> *Ibrahim and Others v. the United Kingdom* [GC], cited above, para. 270.

<sup>29</sup> *Aleksandr Zaichenko v. Russia*, cited above, paras 41-43, 52. See also *Yankov and Others v. Bulgaria*, no. 4570/05, 23 September 2010, para. 23; *Ibrahim and Others v. the United Kingdom* [GC], cited above, para. 296.

<sup>30</sup> KSC-CC-2019-05, F00001, A03, Annex 3, Confidential.

secure the aims of Article 6 of the Convention.<sup>31</sup> It is the existence of the element of compulsion that raises an issue as to whether the privilege against self-incrimination has been respected.<sup>32</sup> A violation of Article 6 will occur where the degree of compulsion involved destroys the very essence of the privilege against self-incrimination.<sup>33</sup>

34. With respect to the Applicant's complaint about compulsion in this case, he submitted that the Summons mandating him to appear for questioning referred to a fine and imprisonment (see paragraph 20 above). However, the Chamber observes that this warning concerned only the obligation to 'appear for questioning'.<sup>34</sup> Therefore, and bearing in mind that the Applicant did not complain about the Summons to appear for questioning (see paragraph 16 above), the Chamber will disregard that particular warning in its determination of the Referral.

35. The Applicant also directed the Chamber's attention to the element of compulsion that was set out in the Order to produce documents and information. It had consisted of a warning that if the Applicant had failed to produce the documents, such failure 'shall be considered contempt', as a result of which, the SPO may seek enforcement measures to ensure compliance with the Order.<sup>35</sup>

36. The Chamber is satisfied that under the terms of the Order, as it stood, there existed a clear element of compulsion. Indeed, it consisted of a *warning* that if the Applicant had failed to produce the specified documents,<sup>36</sup> such failure would be

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<sup>31</sup> *Bykov v. Russia* [GC], cited above, para. 92.

<sup>32</sup> *Ibrahim and Others v. the United Kingdom* [GC], cited above, para. 267.

<sup>33</sup> *Ibid.*, para. 269. See also *Heaney and McGuinness v. Ireland*, cited above, paras 54-55; *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, ECHR 2007-III, para. 55; *Bykov v. Russia* [GC], cited above, paras 92-93. See also Kosovo, Constitutional Court, *Request for constitutional review of Judgment Pml No. 225/2017 of the Supreme Court, of 18 December 2017*, cited above, paras 59-61.

<sup>34</sup> KSC-CC-2019-05, F00001, A02, Annex 2, Confidential.

<sup>35</sup> KSC-CC-2019-05, F00001, A03, Annex 3, Confidential.

<sup>36</sup> The Strasbourg Court has not limited Article 6 of the Convention to situations where the authorities request a suspect to answer questions. It applies also to situations where a person is required to hand

considered 'contempt'. The threat of legal proceedings being instituted to enforce compliance if the Applicant had failed to produce the documents had served to compound the element of compulsion. In considering the present proceedings, the Chamber finds it appropriate to recall two relevant strands of the Strasbourg Court's case law on the consequences of compulsion. The first refers to situations where information obtained under a threat of sanctions is subsequently used at trial, and the second relates to situations where suspects are sanctioned for refusing to provide the information sought under threat.<sup>37</sup>

(i) Subsequent Use of Information at Trial

37. The first strand of case law may be seen in a case, such as, *Saunders v. the United Kingdom*, where a suspect is obliged to provide evidence under threat of sanctions for failure so to do. The suspect, acting on foot of the threat of legal sanctions, provides the evidence and the evidence so obtained is, subsequently, used at his or her trial.<sup>38</sup>

38. In the present case, the Applicant submitted that, in the event of a trial against him, any material provided under the Order could harm his defence and give an unfair advantage to the SPO (see paragraph 20 *in fine* above). However, unlike in *Saunders v. the United Kingdom*, there has, in fact, been no trial or conviction in the Applicant's case. The Chamber cannot speculate as to whether the Applicant would have been put on trial, whether the documents specified in the Order would have been used, whether the Applicant would have been convicted, and whether the fairness of the trial as a whole, if any, would thereby, have been compromised.<sup>39</sup>

39. As held by the Strasbourg Court, Article 6 of the Convention may be relevant in pre-trial proceedings 'if and so far as the fairness of the trial is likely to be seriously

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over documents. See *J.B. v. Switzerland*, no. 31827/96, ECHR 2001-III, paras 65-66. See also *Funke v. France*, 25 February 1993, Series A no. 256-A, paras 41, 44.

<sup>37</sup> See also *O'Halloran and Francis v. the United Kingdom* [GC], cited above, para. 43.

<sup>38</sup> See *Saunders v. the United Kingdom*, cited above, paras 57, 67 *in fine*, 69-76.

<sup>39</sup> See *Nikolova v. Bulgaria* (dec.), no. 31195/96, 27 February 1997.

prejudiced by an initial [pre-trial] failure to comply with [...] provisions [of Article 6]'.<sup>40</sup> Furthermore, '[c]omplaints under Article 6 about the investigation stage tend to crystallise at the trial itself when an application is made by the prosecution to admit evidence obtained during the pre-trial proceedings and the defence opposes the application'.<sup>41</sup>

40. Given that the Referral concerned the investigative stage of proceedings, the Chamber could not, at this remove, assess whether the Order, as issued, would have compromised the fairness of a trial, if any, against the Applicant. Had the Order not been withdrawn, that aspect of the Applicant's allegations, namely, that compulsion to provide the specified documents could affect the fairness of a trial, was premature.<sup>42</sup>

(ii) Sanctions for Refusing to Provide Information

41. The second relevant strand of Strasbourg case law relates to sanctions which are imposed upon a suspect for refusing to provide specific information. It arises in cases where a suspect is requested to provide information, as in *Heaney and McGuinness v. Ireland*,<sup>43</sup> or documents, as in *J.B. v. Switzerland*,<sup>44</sup> under a threat of sanction and is, subsequently, punished for refusing so to do. In such a situation, an issue under Article 6 of the Convention can arise even if an individual is not indicted in the underlying proceedings or is acquitted following a trial, if any.<sup>45</sup> The issue in this

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<sup>40</sup> *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008, para. 50 (emphasis added). See also *Ibrahim and Others v. the United Kingdom* [GC], cited above, para. 253. See also *Request for constitutional review of Judgment Pml No. 225/2017 of the Supreme Court, of 18 December 2017*, cited above, paras 61 *et seq.*

<sup>41</sup> *Ibrahim and Others v. the United Kingdom* [GC], cited above, para. 254, with further references.

<sup>42</sup> See *Nikolova v. Bulgaria* (dec.), cited above. See also *Guliyev v. Azerbaijan* (dec.), no. 35584/02, 27 May 2004; *Fedko v. Ukraine* (dec.), no. 17277/03, 4 December 2006; *Hradecký v. Czech Republic* (dec.), no. 76802/01, 26 February 2002; *Karalevičius v. Lithuania and Russia* (dec.), no. 53254/99, 17 October 2000; *Ziacik v. Slovenia* (dec.), no. 43377/98, 27 January 2000.

<sup>43</sup> *Heaney and McGuinness v. Ireland*, cited above, paras 41, 45, 55.

<sup>44</sup> *J.B. v. Switzerland*, cited above, paras 63, 65-71. See also *Funke v. France*, cited above, paras 41, 44.

<sup>45</sup> See also *O'Halloran and Francis v. the United Kingdom* [GC], cited above, para. 35 *in fine*; *Shannon v. the United Kingdom*, no. 6563/03, 4 October 2005, paras 26, 33-35.

strand of case law focuses on an individual being sanctioned for a failure to provide evidence.

42. In the Applicant's submission, the Order, as issued, constituted an improper compulsion to provide the SPO with potential evidence, in that it contained a threat that the Applicant's failure to provide the documents would be considered contempt and, as a result thereof, enforcement measures could be taken to ensure compliance with the Order (see paragraph 20 above).

43. In that regard, the Chamber observes that it is true that the Order had stated that the Applicant's failure to produce the requested documents would be considered 'contempt', as a result of which, enforcement measures could be taken to ensure compliance with the Order.<sup>46</sup> In relation to such terms of the Order, as issued, the Chamber recalls that in *Heaney and McGuinness v. Ireland* the Strasbourg Court found a violation of Article 6 of the Convention where, in the course of a criminal investigation, police officers, under threat of sanctions, had requested suspects to provide certain information. The suspects had refused to do so, and the authorities had then prosecuted them for failing to provide the information.<sup>47</sup>

44. The Chamber considers that the warning of a finding of 'contempt' and the threat of enforcement measures, with which the Applicant was confronted, fell within the aforementioned strain of case law. The Chamber considers that such a finding of 'contempt' and any resultant enforcement measures that may have followed the Applicant's refusal to provide the documents could, in all likelihood, have led to a situation impermissible under Article 30(6) of the Constitution and Article 6(1) of the Convention.

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<sup>46</sup> KSC-CC-2019-05, F00001, A03, Annex 3, Confidential.

<sup>47</sup> *Heaney and McGuinness v. Ireland*, cited above, paras 10, 41, 45, 47-59.



## VI. FURTHER OBSERVATIONS

45. In view of the impermissible nature of the SPO Order, as issued, the Chamber, in order to preserve the Applicant's constitutional rights to silence and to not incriminate himself, suspended, on 7 February 2019, the Order in so far as it had *obliged* the Applicant to produce the documents and information.<sup>48</sup> The interim measure ensured that the *status quo* was maintained, pending the Chamber's determination of the Referral, and that the Applicant could not have been found in contempt and enforcement measures taken against him should he have exercised his rights to silence and to not incriminate himself when he appeared for questioning on 11 February 2019.

46. Having examined the Applicant's situation the Chamber is satisfied that, as matters stand, there is no finding of contempt nor have any enforcement measures been taken against him for failing to produce the documents specified in the Order. Had the Order not been withdrawn (see paragraph 11 above) and had such proceedings been initiated, then an issue could have arisen as regards the right to silence and the privilege against self-incrimination, even if the Applicant's status did not change from that of a suspect to that of an accused.

47. The consequences of the SPO making such a finding and instituting enforcement proceedings against the Applicant for exercising his rights under the Constitution, have been set out clearly herein with specific regard to the Strasbourg Court's finding of a violation of Article 6 of the Convention in *Heaney and McGuinness v. Ireland* (see paragraphs 43 and 44 above).

48. The Chamber recalls that the authorities have a range of measures available to them for obtaining material that may be relevant to an investigation without breaching the privilege against self-incrimination. That privilege, the Chamber recalls,

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<sup>48</sup> KSC-CC-2019-05, F00010, Order on request of Mahir Hasani for interim measure, Public, 7 February 2019.



does not extend to the use in criminal proceedings of material which may be obtained through the exercise of compulsory powers but which has an existence independent of the will of a suspect, such as, for example, where evidence is acquired pursuant to a search warrant.<sup>49</sup>

49. The Chamber considers that the right to silence and the privilege against self-incrimination under Article 30 of the Constitution and Article 6 of the Convention were engaged under the terms of the Order, as issued. As noted in its ruling granting the interim measure, the Order was problematic on its face in so far as it had *obliged* the Applicant, a confirmed suspect, to produce the documents and information and had warned that *contempt* would be found with possible enforcement measures taken if the Applicant had failed to produce the documents specified in the Order.

50. In accordance with Article 49(1) and (3) of the Law, the task of this Chamber is to assess whether the irregularities complained of by the Applicant have violated his individual rights and freedoms guaranteed by the Constitution. It is not the Chamber's function to deal with errors of fact or law allegedly made in the course of criminal proceedings, except and only in so far as such errors may involve infringements or violations of constitutional rights.<sup>50</sup> The Applicant's complaints in filing the Referral raised important issues concerning alleged infringements of his rights under the Constitution.

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<sup>49</sup> *O'Halloran and Francis v. the United Kingdom* [GC], cited above, para. 47; *Saunders v. the United Kingdom*, cited above, para. 69. See also *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX, para. 102; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, ECHR 2001-IX, para. 80.

<sup>50</sup> In this regard, see *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, ECHR 2015, para. 61; *Perez v. France* [GC], no. 47287/99, ECHR 2004-I, para. 82. See also, Kosovo, Constitutional Court, *Request for constitutional review of Judgment Pml No. 225/2017 of the Supreme Court of 18 December 2017*, cited above, para. 38; *Constitutional review of Judgment Pml No. 44/2018 of the Supreme Court of 10 April 2018*, KI 72/18, Resolution on inadmissibility, 22 November 2018 (14 December 2018), para. 40; *Constitutional review of the Decision No. 2407/2006 of the Supreme Court of Kosovo, dated 30 September 2009*, KI 55/09, Judgment, 13 December 2010 (6 April 2011), paras 18, 21.

## VII. EVENTS SUBSEQUENT TO THE LODGING OF THE REFERRAL

51. The Chamber observes that on 15 February 2019 the Specialist Prosecutor filed a Notice of Withdrawal of the Order, the subject matter of this Referral, and a Request for Dismissal of the Referral (see paragraph 11 above).

52. The Specialist Prosecutor submitted that by his withdrawal of the Order the circumstances complained of in the Referral lodged by the Applicant no longer existed. He further submitted that any potential impact of any alleged violation of the Applicant's rights has been redressed, firstly, by the interim measure ordered by this Chamber and, secondly, by the Specialist Prosecutor's Office's withdrawal of the Order.

53. In so far as the Specialist Prosecutor submits that the alleged violations of the Applicant's rights have been redressed, the Chamber recalls that according to the case law of the Strasbourg Court, a decision or measure favourable to an applicant is not, in principle, sufficient to deprive him or her of victim status unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention.<sup>51</sup>

54. The Chamber observes that the Specialist Prosecutor's withdrawal of the Order does not acknowledge any breach of the Applicant's constitutional rights nor does it offer any redress. However, the Chamber considers that, at this early stage of the proceedings and, particularly, in circumstances where the Applicant's Referral has not been declared admissible, there is no requirement to consider the sufficiency or otherwise of any acknowledgement or redress. Such a requirement would only arise if a violation of the Applicant's constitutional rights had, in fact, been found.<sup>52</sup>

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<sup>51</sup> See *Scordino v. Italy (no. 1)* [GC], no. 36813/97, ECHR 2006-V, para. 180; *Gäfgen v. Germany* [GC], no. 22978/05, ECHR 2010, para. 115; *Nada v. Switzerland* [GC], no. 10593/08, ECHR 2012, para. 128.

<sup>52</sup> See *Sakniovskiy v. Russia* [GC], no. 21272/03, 2 November 2010, para. 66.

55. The Strasbourg Court has confirmed that the question of whether an applicant can claim to be a victim of an alleged violation is relevant at all stages of the proceedings.<sup>53</sup> The Chamber considers that in determining whether a case should be dismissed it may take into account events occurring subsequent to the lodging of a Referral.<sup>54</sup> For the Chamber, the issue of whether the Applicant may still claim to be a victim of the alleged violations of his constitutional rights essentially means that the realities of his situation must be taken into account. Therefore, regard should be had not only to the formal position as it was at the time when the Referral was lodged but to all of the circumstances of the case in question. It further means that developments which have occurred since the filing of the Referral must, of necessity, be considered.<sup>55</sup>

56. In considering all the circumstances of the instant case, the Chamber observes that in the Referral the Applicant requested this Chamber to declare the SPO Order void or alternatively '*to order the Specialist Prosecutor's Office to revoke the said Order*'. By filing the Notice of Withdrawal, the Specialist Prosecutor has, in fact, and of his own volition, revoked the Order. This measure has effectively returned the Applicant to the situation he was in prior to the Order being made.

57. In these circumstances, the Chamber concludes that there is no longer any objective justification for the Applicant to pursue the Referral. The Chamber is satisfied that by withdrawing the Order, the circumstances complained of by the Applicant no longer obtain. It is further satisfied that the effects of any possible violation of the Applicant's constitutional rights by virtue of the Order, as issued, have been obviated.

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<sup>53</sup> See *Tănase v. Moldova* [GC], no. 7/08, ECHR 2010, para. 105.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

58. The Chamber considers that respect for human rights as defined in the Constitution does not require it to continue the examination of the Applicant's Referral.

59. In view of the foregoing, and having regard to the fact that the Applicant's constitutional rights to silence and to not incriminate himself have been preserved, the Chamber is satisfied that, as matters now stand, his complaints under Article 30(6) of the Constitution and Article 6(1) of the Convention are inadmissible for want of victim status. This finding applies also to the alleged violation of Article 31(5) of the Constitution and Article 6(2) of the Convention, given, in particular, that the Applicant alleged that the Order had violated the presumption of innocence by seeking to shift the burden of proof (see paragraphs 19 *in fine* and 21 above).<sup>56</sup>

60. In view of the Chamber's finding that the Referral is inadmissible for want of victim status, the Chamber does not find it necessary to address, specifically, the Applicant's claim that there was no other legal remedy available to him nor the Specialist Prosecutor's submission concerning alleged non-exhaustion of legal remedies.

61. As the Order grounding the Applicant's complaints has been withdrawn, the Referral must be declared inadmissible pursuant to Rule 14(f) of the Rules.

62. Pursuant to Rule 21(6) of the Rules and bearing in mind the Specialist Prosecutor's withdrawal of the Order, the interim measure ordered on 7 February 2019 expires with immediate effect.

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<sup>56</sup> As regards a link between the right to silence and the privilege against self-incrimination, on the one hand, and the presumption of innocence, on the other, see, for example, *Krumpholz v. Austria*, no. 13201/05, 18 March 2010, para. 30.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

*Declares* the Referral concerning the Order of the Specialist Prosecutor's Office dated 20 December 2018 inadmissible.



**Judge Ann Power-Forde**  
**Presiding Judge**

Done in English on Wednesday, 20 February 2019,  
At The Hague, the Netherlands