

**In:**

**Before:** Constitutional Court Panel

**Registrar:** Dr. Fidelma Donlon

**Filing Participant:** Mr. Driton Lajci

**Date:** 13 November 2019

**Language:** English

**File Name:**

**Classification:** Public

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**Referral to the Constitutional Court Panel on the Legality of the Interview  
Procedure**

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**Specialist Prosecutor's Office**

Mr. Jack Smith

**Specialist Counsel for Mr.**

**Driton Lajci**

Mr. Toby Cadman

## 1. Introduction

- 1.1. This referral is lodged by Mr. Driton Lajci (hereinafter: Applicant) under Article 113(7) of the Constitution of the Republic of Kosovo (hereinafter: Constitution).
- 1.2. The complaint centres on whether the order of the Specialist Prosecutor's Office (hereinafter: SPO), that directed him, as a suspect, to submit himself for interview by the SPO, was lawful, and/or, in accordance with the Constitution, having regard to the fact that upon reading the summons issued:
  - a) The specific offence the Applicant was suspected of committing was not disclosed; and
  - b) The evidential basis giving rise to the Applicant being suspected of committing an offence was not disclosed.
- 1.3. Further to the above, the Applicant questions whether, what for the purposes of this complaint is referred to as, the 'interview procedure', was lawful, and/or, in accordance with the Constitution, on the basis that:
  - a) Prior to the interview commencing, neither the Applicant, nor his instructed legal Counsel, Mr. Toby Cadman, were advised as to the specific offence the Applicant was suspected of committing;
  - b) No pre-interview disclosure took place, to either the Applicant, or his instructed legal Counsel Mr. Toby Cadman, and therefore, the evidential basis giving rise to the Applicant being suspected of committing an offence was not disclosed.

1.4. It is respectfully submitted at the outset, that the summons, and thereafter, the procedure adopted for the purpose of interview in accordance with that summons, is not in accordance with:

- a) The Constitution of Kosovo;
- b) The Rules of Evidence and Procedure for the Kosovo Specialist Chamber; and
- c) The obligations of Kosovo, and therefore the Chamber, to act in adherence to international human rights law, including, but limited to:
  - i. The International Covenant on Civil and Political Rights (ICCPR); and
  - ii. The European Convention on Human Rights (ECHR).

## 2. Factual Outline

2.1. The Applicant was initially summoned for interview on 29-30 May 2019, but this subsequently cancelled by the SPO due to operational reasons.

2.2. On 25 September 2019, the Applicant received a summons from the SPO requiring him to appear for questioning at the Hague on 17-18 October 2019, starting at 09:00. It was not disclosed whether the interview was scheduled to last two days in duration or whether it would occur within the two-day schedule.

2.3. That summons notes that it *“relates to official criminal investigations of the Specialist Prosecutor’s Office”*, and that *“As there are grounds to believe that you*

*have been involved in the commission of a crime within the jurisdiction of the Kosovo Specialist Chambers...".*

- 2.4. The summons does not disclose any further information in respect of the offence the Applicant is suspected of committing.
- 2.5. On 13 October 2019, correspondence was sent to the SPO, enquiring as to *"the basis and foundation of the allegations, namely what are the specific allegations"*. A copy of that correspondence is attached to this petition.
- 2.6. The letter further goes to highlight *"The summons is insufficiently particularised at this time, and does not disclose any offence in contravention of accepted international standards for the investigation and prosecution of criminal offences"*, and that there *"has been no disclosure of any material that could form the basis and foundation of any allegation"*.
- 2.7. The letter requests that prior to the interview, *"the offence be appropriately particularised so as to ensure that Mr. Lajci is aware of that which he is being asked to answer for and the basis and foundation of the allegation is provided to him in writing along with appropriate disclosure"*.
- 2.8. On 14 October 2019, the SPO responded by email, advising that *"...there is no requirement in the Law that the SPO provide your client with details of the evidence in its possession at this time"*.
- 2.9. The email does go on to note however that *"The Specialist Prosecutor's Office is investigating the role of your client's office and your client personally in possible obstruction of justice, including without limitation possible violations of Article 394 (obstruction of evidence or official proceedings) and Article 395 (intimidation during*

*criminal proceedings) of the Criminal Code of the Republic of Kosovo, incorporated under Article 15(2) of the Law.”*

- 2.10. Accordingly, the SPO refused to disclose any evidence relating to the allegation, evidence that would assist in instructed Counsel being in a position to advise the Applicant appropriately.
- 2.11. It is appropriate to highlight however, that it is inferred that the SPO accepts that the summons was insufficiently particularised, on the basis that the SPO in the email of 14 October 2019, confirmed the offences that the Applicant was to be questioned about.
- 2.12. On the evening of 16 October 2019, a Prosecutor in the SPO contacted the Applicant's counsel, Mr. Artan Cerchini, by telephone and enquired whether the Applicant intended to give a 'no comment' interview. The Prosecutor was informed that on the basis that the SPO had failed to provide information prior to the interview that could form the basis and foundation of any allegation along with the appropriate disclosure, the Applicant would decline to answer any questions.
- 2.13. On 17 October 2019 the Applicant attended for interview with his instructed Counsel. The interview took place between 09.51 – 10.30 and 10.35 – 10.54.
- 2.14. No pre-interview disclosure was provided other than the offence as noted at paragraphs 2.9 and 2.11 above.
- 2.15. Mr. Cadman, as instructed Counsel, was not in a position to advise the Applicant, given the refusal to disclose any details, and accordingly, the Applicant exercised his right to silence, other than to confirm that he would be making no comment to all questions when asked, because of that refusal.

- 2.16. The Applicant provided a written statement, attached to this petition, that was read out for the record.
- 2.17. During the interview, the Prosecutor stated for the record that the SPO had not refused to comply with the request and set out the basis for its failure to provide any information prior to the interview other than a generalised allegation as the applicable legal framework did not require it to do so.
- 2.18. During the course of the interview the Prosecutor repeatedly, and incorrectly, questioned the Applicant that his refusal to answer any questions was based on his right to freedom from self-incrimination. It is important to note, as the Court will be aware, that the right to silence and the right to freedom from self-incrimination are separate free-standing rights to which the Court is required, under the Constitution, its own rules and the applicable international instruments, to uphold.

### 3. Legal Framework

- 3.1. The statutory authority for the Kosovo Specialist Chambers (hereinafter: Chambers) and Specialist Prosecutor's Office, is contained in *Law No.05/L-053*.
- 3.2. Given the status of the Chambers as being domestic in nature, but entirely staffed by international judges, as much as the law relating to the Chambers is separate and distinct, it must also be read in conjunction with the Constitution of Kosovo, and relevant excerpts of the Criminal Code of Kosovo.
- 3.3. The rights of an accused are contained within *Article 21* of the Statute, in particular, reference is drawn to Article 21(4)(a) that reads:

4. *In the determination of any charge against the accused pursuant to this Law, the accused shall be entitled to the following minimum guarantees, in full equality:*
- a. *to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.*
- 3.4. *Article 38 of the Statute proscribes the procedure concerning 'Investigation and Preparation of the Indictment'.*
- 3.5. *In terms of an 'investigation', Article 38(3)(a) is of significant relevance, wherein it proscribes:*
3. *If questioned, the suspect shall not be compelled to incriminate himself or herself or to confess guilt. Nor shall he or she be subject to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman and degrading treatment or punishment. He or she shall have the following rights of which he or she shall be informed prior to questioning, in a language he or she speaks and understands:*
- a. *The right to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Specialist Chambers.*
- 3.6. *Turning to the 'Rules of Procedure and Evidence Before the Kosovo Specialist Chambers', attention is drawn to Rule 43 – Rights of Suspects During Investigation, wherein at sub-rule (1), it reads:*
- (1) *Where the Specialist prosecutor has a reasonable suspicion that the person has committed or participated in the commission of a crime within the jurisdiction of the Specialist Chambers, that person shall be deemed a suspect and shall, once notified, have, at a minimum, the rights provided for in Article 38(3) of the Law.*

3.7. The issue for the purposes of the Applicants submission, is firstly, the meaning of 'charge', and secondly, whether the rights as espoused in *Article 21(4)*, apply to the investigatory process, and therefore are to be subsumed into *Article 38*.

3.8. Further, and/or in the alternative, whether the right proscribed in *Article 38* includes the details of the offence suspected, and the basis for the Applicant and/or any other individual, being suspected of committing that offence.

3.9. The Chambers' attention is also respectfully drawn to *Article 19* of the Statute, in particular sub-article (2), which reads:

2. *The Rules of Procedure and Evidence shall reflect the highest standards of international human rights law including the ECHR and ICCPR with a view to ensuring a fair and expeditious trial..."*

#### **4. Submissions**

4.1. The Applicant's submissions are twofold.

4.2. In the first instance, it is respectfully submitted that the position adopted by the Statute at *Article 21(4)(a)* insofar as the disclosure of the basis of the charge is concerned, ought to be read as being incorporated into *Article 38(3)(a)*, and thus, there is a requirement that any individual summonsed for interview as a suspect, is made aware of the specific nature of the offences for which he is to be interviewed, and further, the evidential basis upon which the allegation is founded.



- 4.3. Accordingly, the failure to do so either in writing prior to the date of interview, or immediately prior to the interview of the Applicant, was unlawful, and therefore, the Applicant's interview is not admissible in any proceedings should an indictment be proffered.
- 4.4. Secondly, and/or in the alternative, if Article 38 is not to be read in conjunction with, or as incorporating Article 21, Article 38 as currently drafted and enacted, and therefore, Rule 43(1), on the basis of the limitations provided in Article 38, is unconstitutional, taking into account Article 19 of the Statute.
- 4.5. Further, with regard to Article 19 of the Statute, reference is made to Article 2, in that:

*"Any limitations on fundamental rights and freedoms are undertaken pursuant to Article 55 of the Constitution for the objective and reasonable purposes expressed in this Article, consistent with Chapter II of the Constitution and international standards of justice and due process. These purposes are in the vital interest of Kosovo as an open and democratic society and are in fulfilment of Kosovo's international obligations. Consistent with Article 55 of the Constitution, these limitation shall only be imposed to the extent necessary for the fulfilment of these vital purposes".*

- 4.6. In determining which rights a 'suspect' has for the purpose of interview, guidance is taken from applicable human rights laws to which Kosovo is bound, and to which the Chambers accepts that it is also bound as per Article 2 as noted.
- 4.7. With the above in mind, it is a fundamental principle that instructed Counsel *must* be in a position to adequately represent the individual being questioned, and that includes the ability to advise upon whether:

- a) The summons is lawful;
- b) Whether the individual ought to answer questions; or
- c) Whether the individual ought to exercise his right to silence.

4.8. This principle is recognised in both numerous domestic institutions, and international mechanisms alike.

4.9. The Chamber's attention is drawn to EU Directive 2012/13/EU, of 22 May 2012, wherein paragraph (28) reads:

*"The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at the latest before their first official interview by the police or another competent authority, and without prejudicing the course of on-going investigations. A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspect or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence".<sup>1</sup>*

4.10. As has already been alluded to, the 'Statute' and 'Rules' of the Chambers, refer to disclosure, and the right of an individual to be made aware of the substance of the charge against him or her.

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<sup>1</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF>

- 4.11. The issue of when an individual has been deemed to have been ‘charged’, or what constitutes a ‘charge’ has been considered by the European Court of Human Rights.
- 4.12. In the case of *Ibrahim and others v. The UK*,<sup>2</sup> the Grand Chamber considers, at paragraph 203 onwards, the European Directive as noted above, highlighting that only the United Kingdom, Ireland, and Denmark chose not to participate. It is accepted that Kosovo is not a member of the European Union, however, on the basis that it seeks membership of the same, and further, that the Chambers itself has confirmed that it will be bound by relevant Human Rights laws, it is respectfully submitted that the Directive is of relevance to the procedures adopted by the SPO.
- 4.13. Further, and in any event, having regard to the case of *Ibrahim*, at paragraph 249, the Grand Chamber considers what constitutes a ‘criminal charge’, and determines:

*“The protections afforded by Article 6(1) and (3) apply to a person subject to a “criminal charge”, within the autonomous Convention meaning of that term. A “criminal charge” exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him”<sup>3</sup>*

- 4.14. Further reference has been made to the case of *Ibrahim* and the definition of ‘criminal charge’ by the Chambers, in its *“Pronouncement of Ruling on the*

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<sup>2</sup> [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-166680\"\]}](https://hudoc.echr.coe.int/eng#{\)

<sup>3</sup> Also, see *Deweert v. Belgium*, 27 February 1980, *Eckle v. Germany* 15 July 1982, and *McFarlane v. Ireland* [GC] 10 September 2010.

*Referral by Mr. Mahir Hasani Concerning Prosecution Order of 20 December 2018.”<sup>4</sup>*

4.15. On that occasion, the Chamber observed:

*“The European Court of Human Rights has confirmed that the protections afforded by Article 6(1) and (3) of the Convention apply to a person who is subject to a “criminal charge”...In 2016 in the case of Ibrahim and Others v. the United Kingdom, the Grand Chamber endorsed the approach taken earlier in Aleksandr Zaichenko v. Russia wherein the Court had explained that once there is a suspicion of a criminal offence against a person, that person is considered as being subject to a ‘charge’ for the purposes of Article 6 of the Convention.”*

4.16. Article 6(3)(a) of the Convention highlights that there must be particular attention paid to the notification of any ‘accusation’ to the Defendant, as the particulars of the offence are crucial in enabling an individual to prepare his defence, and further, take an active role in that defence.<sup>5</sup>

4.17. The right under Article 6(3) develops however, in that it also affords the defendant the right to be informed not merely of the ‘cause’ of the accusation *i.e.* the acts he or she is suspected of committing and thus the facts upon which the accusation is based, but also the ‘nature’ of the accusation, noting *Mattoccia v. Italy*.<sup>6</sup>

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<sup>4</sup> KSC-CC-2019-05 - <https://www.scp-ks.org/en/documents/pronouncement-ruling-referral-mr-mahir-hasani-concerning-prosecution-order-20-december>

<sup>5</sup> See *Pelissier and Sassi v. France* [GC] [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-58226\"\]}](https://hudoc.echr.coe.int/eng#{\) ; and *Kamasinski v. Austria* [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-57614\"\]}](https://hudoc.echr.coe.int/eng#{\)

<sup>6</sup> [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-58764\"\]}](https://hudoc.echr.coe.int/eng#{\) ; see also *Penev v. Bulgaria* <https://hudoc.echr.coe.int/eng?i=001-96610>

- 4.18. Accordingly, the position would appear to be clear, in that the Applicant, upon receiving a summons, advising that he was suspected of committing an offence within the jurisdiction of the KSC, was at that point, 'subject to a criminal charge'.
- 4.19. Accordingly, it is respectfully submitted that the protections afforded to an individual subject to a criminal charge, as per Article 38(3)(a), apply, in that the Applicant had the right to be informed of specific offence(s) suspected, and the basis of that suspicion.
- 4.20. The Applicant requested, through his appointed legal representatives, in advance of the interview the basis and foundation of the allegations, namely what were the specific allegations. It was noted that the summons was insufficiently particularised and failed to disclose any offence in contravention of accepted international standards for the investigation and prosecution of criminal offences. It was further noted further that there had been no disclosure of any material that could form the basis and foundation of any allegation. This request was repeated at the outset of the interview and during the course of the interview. On behalf of the Applicant, the SPO was provided with an opportunity to suspend the interview and fix a new date to allow it to comply with its obligations under the applicable legal framework, it refused to do so.
- 4.21. The SPO proceeded with conducting its interview and still failed to put any specific allegations to the Applicant, irrespective of him deciding to exercise his right to silence.
- 4.22. The failure to do so on the part of the SPO is therefore unconstitutional and therefore it must naturally follow that:

- a) The interview must be deemed unlawful;
- b) That interview must be deemed inadmissible;
- c) The procedure adopted by the SPO on a general basis is unconstitutional; and
- d) Having regard to (c), steps must be taken to draft an appropriate practice direction so as to ensure any and all further interviews are done so in accordance with the law.

## 5. Conclusion

- 5.1. The Applicant's position, is that the procedures adopted by the SPO in respect of the summons and interview of individuals is not, in the first instance, in accordance with the KSC Statutory Authority and the associated Rules of Procedure and Evidence; if it is ruled that the procedures *are* in accordance with that authority and rules, then it is argued in the alternative, that the authority and the rules do not adhere to relevant international human rights law, including the European Convention on Human Rights, and are therefore unconstitutional.
- 5.2. The KSC in its commencement Statute, accepts that it is bound by relevant international human rights law, and that this would include the European Convention; accordingly, the Applicant's Article 6 rights must be observed.
- 5.3. The Applicant's Article 6 rights include those contained in Article 6(3), and therefore, include the right to be informed specifically of the offence he is

suspected of committing, but also the basis upon which that suspicion has been formed.

- 5.4. In failing to do so, the Applicant has not been able to be advised fully by instructed Counsel, accordingly, he has been prevented from taking an active part in his defence, and therefore the procedures adopted are a clear violation of Article 6.
- 5.5. The circumstances complained of by the Applicant, therefore, violate his individual rights and freedoms guaranteed by the Constitution.



Toby Cadman

**Word Count:** 3292

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**Name of Judge/Participant**

**Title of Judge/Participant**

**13 November 2019**

**At The Hague Netherlands**