



In: KSC-CC-2019-07

Before: **The Specialist Chamber of the Constitutional Court**
Judge Vidar Stensland, Presiding
Judge Roland Dekkers
Judge Antonio Balsamo

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 2 December 2019

Language: English

Classification: Public

**Prosecution response to Mr Driton Lajci's Referral to the Constitutional Court
Panel on the Legality of the Interview Procedure,
with confidential Annexes 1-3**

Specialist Prosecutor's Office

Jack Smith

Specialist Counsel for Mr

Driton Lajci

Mr Toby Cadman

I. INTRODUCTION

1. The Referral¹ of Mr Driton Lajci ('Applicant') should be summarily dismissed. It is both inadmissible and fails on the merits. In particular, the Applicant did not exhaust the legal remedies available to him prior to filing the Referral. He is obliged to do so before the matter may be considered by the Specialist Chamber of the Constitutional Court ('Constitutional Court'). On the merits, the Applicant misinterprets both the applicable legal framework and the factual record. The Applicant was provided with adequate information and has failed to demonstrate any prejudice to the fairness of future trial proceedings, if any such proceedings should occur.

II. PROCEDURAL HISTORY

2. On 25 September 2019, the Specialist Prosecutor's Office ('SPO') issued a summons to the Applicant to appear for questioning in The Hague on 17-18 October 2019.²

3. On the evening of 13 October 2019, Counsel for the Applicant sent a letter to the SPO,³ to which the SPO replied on 14 October 2019.⁴

4. On 17 October 2019, the interview of the Applicant by the SPO was duly conducted ('Interview').⁵

5. On 13 November 2019, the Applicant filed the Referral before the Constitutional Court.⁶

6. On 15 November 2019, the President of the Specialist Chambers issued a decision, pursuant to Article 33(3) of the Law, assigning a Constitutional Court Panel

¹ Referral to the Constitutional Court Panel on the Legality of the Interview Procedure, KSC-CC-2019-07/F00001, 13 November 2019, distributed on 14 November 2019 ('Referral').

² Annex 1 (summons dated 25 September 2019).

³ Referral, KSC-CC-2019-07/F00001, Annex 1.

⁴ Annex 2 (e-mail from the SPO to Counsel for the Applicant dated 14 October 2019 at 16:43).

⁵ Annex 3 (Transcripts of interview dated 17 October 2019, in Parts 1 and 2).

⁶ Referral, KSC-CC-2019-07/F00001.

to rule on the Referral ('Panel').⁷ The Panel designated English as the working language for the Referral.⁸

7. On 18 November 2019, the Panel, pursuant to Rule 15(2) of the Rules,⁹ invited the SPO to file any submissions in relation to the Referral on or before 2 December 2019.¹⁰

III. SUBMISSIONS

8. The Referral is inadmissible on its face. The Applicant has (i) failed to exhaust all available effective remedies,¹¹ (ii) failed to specifically identify either the impugned ruling or the constitutional provision(s) alleged to have been violated,¹² and (iii) sought the Panel's consideration of matters for which it has no jurisdiction¹³ and/or for which the Applicant has no standing to make a referral.¹⁴ Indeed, tellingly, the Applicant did not even attempt to demonstrate the Referral's admissibility.

9. The Referral must also fail on the merits as (i) the Applicant misinterprets the legal framework for the provision of information to suspects and to accused, as provided for in the Law,¹⁵ the KSC Rules,¹⁶ the Constitution of the Republic of Kosovo

⁷ Decision to Assign Judges to a Constitutional Court Panel, KSC-CC-2019-07/F00002, 15 November 2019.

⁸ Decision on the Working Language, KSC-CC-2019-07/F00005, 18 November 2019, distributed on 19 November 2019.

⁹ Rules of Procedure for the Specialist Chamber of the Constitutional Court, KSC-BD-03/Rev1/2017, 21 July 2017 ('Rules').

¹⁰ Notice regarding Replying Submissions, KSC-CC-2019-07/F00006, 18 November 2019, distributed on 19 November 2019, para.5.

¹¹ See Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 20(1) of the Rules.

¹² See Rule 14(c) of the Rules.

¹³ See Rule 14(a) of the Rules. Referral, KSC-CC-2019-07/F00001, paras 4.3 (making premature representations regard the admissibility of the interview record) and 5.1 (submitting that SPO procedures are not compliant with the Law and KSC Rules, which is not a matter of constitutional interpretation or compatibility).

¹⁴ See Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 20(1) of the Rules. Referral, KSC-CC-2019-07/F00001, paras 4.4 and 5.1 (seeking to refer consideration of the constitutionality of the Law to the Panel).

¹⁵ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

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

(‘Constitution’) and applicable human rights law, (ii) the information provided to the Applicant in this instance exceeded those requirements, and (iii) the Applicant has failed to demonstrate that his right to a fair trial has been prejudiced in any way.

A. THE REFERRAL IS INADMISSIBLE

10. The Constitutional Court may decide only on matters referred to it in a legal manner by authorised parties.¹⁷ 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 exhaustion requirement is not a mere procedural formality. It ensures an orderly procedural process, prevents the simultaneous pursuit of parallel avenues of judicial remedies, preserves the right to appeal, and ensures that the Constitutional Court reviews only those matters that require its attention and does so on the basis of a properly developed record.¹⁸

11. The Rules specifically set forth the exhaustion requirement by requiring that two pre-conditions be met before the filing of a referral by an individual before the Constitutional Court:

- (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.¹⁹

¹⁷ Constitution, Art.113(1); Law, Art.49(2) and (3); Rules, Rules 4 and 20.

¹⁸ 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 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; CCK, Case No. KI.94/17, *Applicant Muhamedali Çeşülmedine*, Resolution on Inadmissibility, 27 April 2018, para.40; CCK, KI.41/09, *Applicant AAB-RIINVEST University LLC*, Resolution, 27 January 2010, paras 16-17, referring to ECtHR, *Selmouni v. France*, no. 25803/94, 28 July 1999.

¹⁹ Rules, Rule 20(1).

12. Neither of these requirements have been met in the present case, nor has the Applicant even attempted to claim that they have. The Referral should be dismissed on this basis alone.

13. Alternative remedies are available, but have not been pursued. The legal framework of the Specialist Chambers provides specific, accessible, and effective remedies and safeguards to address the Applicant's complaint through the regular courts. Article 39(1) and (3) of the Law empower a Pre-Trial Judge, or Single Judge appointed pursuant to Articles 25(1)(f) and 33(2) of the Law, to issue any necessary orders or decisions for the conduct of the investigation and the preparation of fair and expeditious proceedings. More particularly, Article 39(10) of the Law provides that any person appearing pursuant to a summons may request the Pre-Trial or Single Judge to issue such orders as may be necessary for the preparation of his or her defence. These provisions are reinforced by Rule 48(2) of the KSC Rules, which enables a suspect to seek any ruling necessary for the purpose of the investigation or for the preparation and conduct of the proceedings. That framework was clearly designed to enable a Pre-Trial or Single Judge to address matters arising in the course of an investigation, including issues relating to the rights of persons summonsed by the SPO, such as the Applicant.

14. Accordingly, the matters raised in the Referral fall directly within the competencies and jurisdiction of a Pre-Trial or Single Judge. Those channels are required to be exhausted before the matter may be considered by the Constitutional Court.

15. The Applicant has taken no steps to seek remedies pursuant to those provisions, nor has he provided any explanation for his failure to do so. If he were to make such an application, he would have the opportunity to have his arguments heard and adjudicated before a Pre-Trial or Single Judge in the ordinary course. Relatedly, no final ruling within the meaning of Rule 20 of the Rules has been issued on any matter raised in the Referral. The Applicant has not identified any such ruling and has taken none of the required steps to obtain a ruling.

16. Moreover, while the Referral makes generic references to the Constitution in a number of places,²⁰ nowhere does it specifically identify the constitutional provision(s) alleged to have been violated. The SPO understands the Referral to be ultimately directed towards the Applicant's fair trial rights.²¹ However, the Referral in fact raises a range of matters unrelated to the Constitution and over which the Panel would have no jurisdiction, including simply the compatibility of SPO practices with the Law and the KSC Rules,²² and abstract and premature submissions regarding admissibility of evidence.²³ The Referral also appears to seek the Panel's consideration of the constitutionality of the Law and KSC Rules,²⁴ a matter for which an individual is not authorised to make a referral. Rather, consistent with the principle that alleged violations should be addressed by the regular courts in the first instance, it is a pre-trial judge or panel which has the authority, in appropriate circumstances, to make such a referral.²⁵

17. For each of the reasons outlined above, the Panel should summarily dismiss the Referral.

B. THE REFERRAL HAS NO MERIT

1. The Applicant has misinterpreted the applicable framework

18. The Constitutional Court need not reach the merits, but it is clear that the Applicant's claims also fail here. The Law and the KSC Rules provide a framework which is consistent with the Constitution and applicable human rights law. That

²⁰ See e.g. Referral, KSC-CC-2019-07/F00001, paras 1.2-1.4, 5.1, 5.5.

²¹ See e.g. Referral, KSC-CC-2019-07/F00001, paras 1.4(c), 3.9, 4.13, 4.15-4.17, 5.1-5.3 (referring to international human rights, and in particular Article 6 of the European Convention on Human Rights ('ECHR')).

²² Referral, KSC-CC-2019-07/F00001, paras 1.2-1.3 (seeking a ruling on the lawfulness of SPO practices as an alternative to a ruling on their constitutionality), 1.4(b) and 5.1.

²³ Referral, KSC-CC-2019-07/F00001, paras 4.3 and 4.22.

²⁴ Referral, KSC-CC-2019-07/F00001, paras 4.4 and 5.1.

²⁵ Compare Articles 113(7) of the Constitution and 49(3) of the Law (authorising an individual to refer alleged violations of their individual rights and freedoms) with Articles 113(8) of the Constitution and 49(4) of the Law (reserving to a panel the authority, in appropriate circumstances, to refer questions of compatibility of a law to the Constitutional Court).

framework makes a clear distinction between suspects, who have, at a minimum, the rights set out in Article 38 of the Law, and accused persons, who have the rights set out in Article 21 of the Law. The Referral seeks to conflate these two distinct categories without any basis in law or logic.

19. While there is no dispute that the fair trial protections contained in Article 6 of the ECHR²⁶ may apply during an investigative or pre-trial stage, in particular from the time that a person is subject to a 'charge',²⁷ it is self-evident that not all of the rights in Article 6(3) of the ECHR will apply in full, or in some cases at all, at an investigative or pre-trial stage.²⁸ Instead, it has been held that those rights *may* be relevant during investigative and pre-trial proceedings 'if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them'.²⁹ Importantly, the rights set out in Article 6(3) of the ECHR are not aims in themselves, rather, their purpose is to contribute to the fairness of the proceedings as a whole.³⁰ Therefore, contrary to the Applicant's misguided attempt to have Article 21 of the Law, or Article 6(3) of the ECHR, read wholesale into Article 38 of the Law,³¹ the manner in which Article 6(3) is to be applied at the investigative stage depends on, *inter alia*, the special features of the proceedings involved, and on the circumstances of the case.³²

²⁶ See *similarly* the fair trial rights set out in Article 30(1) of the Constitution and Article 14(3)(a) of the International Covenant on Civil and Political Rights ('ICCPR').

²⁷ It is well established that a 'charge' within the meaning of Article 6 of the ECHR arises from the moment at which 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 has been substantially affected by actions taken by the authorities as a result of a suspicion against that person (see e.g. European Court of Human Rights ('ECtHR'), GC, *Ibrahim and Others v. The United Kingdom*, nos 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016 ('*Ibrahim and Others v. The United Kingdom*'), para.249). This includes circumstances in which a person is interviewed as a suspect, as in the case of the Applicant (ECtHR, *Hozee v. The Netherlands*, 22 May 1998, paras 45-46).

²⁸ This may most obviously be the case in respect of, for example, Article 6(3)(d) of the ECHR (which sets out, *inter alia*, the right of a person to examine or have examined the witnesses against him or her).

²⁹ See e.g. *Ibrahim and Others v. The United Kingdom*, para.253; ECtHR, *Imbroscia v. Switzerland*, 13972/88, 24 November 1993, para.36.

³⁰ See e.g. *Ibrahim and Others v. The United Kingdom*, para.251. See also para.253 (emphasising that Article 6 of the ECHR is primarily concerned with ensuring a fair trial).

³¹ See e.g. Referral, KSC-CC-2019-07/F00001, paras 3.7-3.8, 4.2, 4.4, 4.19.

³² See e.g. *Ibrahim and Others v. The United Kingdom*, para.253.

20. The purpose of Article 6(3)(a) of the ECHR is to protect a person's ability to prepare his or her defence at trial.³³ That purpose does not require the prosecution to disclose its investigative focus or its evidence to each suspect it interviews during the investigation phase. Most of the suspects interviewed will never be charged, and all suspects have the right to decline to answer any or all of the questions put to them by the prosecution or to consult with counsel before answering any question. The right to silence and to counsel fully protect the rights of suspects during interview.

21. The distinction between the investigative and trial stages has also been recognised by the UN Human Rights Committee ('HRC') in interpreting equivalent provisions contained in the ICCPR.³⁴ Likewise, Trial Chambers at the International Criminal Tribunal for the former Yugoslavia ('ICTY') have consistently rejected attempts to rely upon the full scope of Article 14(3)(a) of the ICCPR in the context of investigative interviews.³⁵

22. Notably, the Applicant provided no applicable authority for the contention that detailed notice of the nature and cause of charges against him is required at the point of issuance of a summons for an investigative interview, and/or otherwise prior to commencement of that interview. None of the ECtHR cases cited in the Referral support that position.³⁶ Those cases concern: (i) the privilege against self-incrimination

³³ ECtHR, GC, *Pélissier and Sassi v. France*, no. 25444/94, 25 March 1999 ('*Pélissier and Sassi v. France*'), para.52 (linking the right to information to ensuring the fairness of subsequent proceedings); ECtHR, *Mattoccia v. Italy*, no. 23969/94, 25 July 2000 ('*Mattoccia v. Italy*'), para.60. See also European Commission on Human Rights, *C. v. Italy*, no. 10889/84, 11 May 1988, p.59 ('the information received by the applicant [...] was therefore transmitted in good time for the preparation of his defence, which is the principal underlying purpose of Article 6 para.3(a) of the Convention. Although the receipt of information at an earlier stage could have carried certain advantages for the applicant, the Commission is unable to find any appearance of a violation of Article 6 para.3 (a) of the Convention').

³⁴ HRC, *Khachatrian v. Armenia*, no. 1056/2002, 28 October 2005, para.6.4. See also HRC *Evelio Ramon Gimenez v. Paraguay*, no. 2372/2014, 25 July 2018, para.7.10; HRC *Kelly v Jamaica*, 253/1987, 10 April 1991, para.5.8. HRC, General Comment no. 32, Article 14: Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/CG/32, para.31.

³⁵ ICTY, *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4, Decision on Bajrush Morina's Request for a Declaration of Inadmissibility and Exclusion of Evidence, IT-04-84-R77.4, 28 August 2008, para.30; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on the Admissibility of the Borovčanin Interview and the amendment of the Rule 65 Ter Exhibit List, 25 October 2007, para.35.

³⁶ Referral, KSC-CC-2019-07/F00001, para.4.12 (referring to *Ibrahim and Others v. The United Kingdom*), 4.16 (referring to *Pélissier and Sassi v. France*), ECtHR, *Kamasinski v. Austria*, no. 9783/82, 19 December

and the right to legal assistance during a suspect interview;³⁷ (ii) the applicability of Article 6(3)(a) of the ECHR following service of an indictment, and shortly before the commencement of trial;³⁸ and (3) the requalification of charges during trial.³⁹

23. The Applicant's submission that he was entitled to receive disclosure of the underlying evidential basis for allegations,⁴⁰ is entirely unsupported. It is insufficient to merely assert that such disclosure would have assisted Counsel in advising his client.⁴¹ No right to such disclosure exists at the investigative stage, nor does such material necessarily even fall within the ambit of Article 6(3)(a) of the ECHR.⁴²

24. The Applicant relies principally on European Union Directive 2012/13/EU,⁴³ which does not form part of the legal framework applicable to the Specialist Chambers and should be disregarded accordingly. In any event, that Directive contradicts rather than supports the Applicant's position. It reflects a similar framework to that set out in the Law and in Article 6 of the ECHR by noting that the information required: (i) is that which is 'necessary to safeguard the fairness of the proceedings and the effective rights of the defence',⁴⁴ (ii) depends on the stage of the criminal proceedings and, in particular, that it is at the point of submission of charges to a court that the full scope of the obligation crystallises;⁴⁵ and (iii) must not be such as would prejudice the course

1989 (*Kamasinski v. Austria*)), 4.17 (referring to *Mattoccia v. Italy*), ECtHR, *Penev v. Bulgaria*, no. 20494/04, 7 January 2010 (*Penev v. Bulgaria*)).

³⁷ *Ibrahim and Others v. The United Kingdom*, paras 255-273, 294, 311, 315.

³⁸ *Kamasinski v. Austria*, paras 78-81; *Mattoccia v. Italy*, paras 58-72. Notably, in *Kamasinski v. Austria*, the ECtHR observed that it is from the moment of the service of the indictment that the defendant is formally put on written notice of the factual and legal basis of the charges against him (*Kamasinski v. Austria*, para.78).

³⁹ *Pelissier and Sassi v. France*, paras 42-63; *Penev v. Bulgaria*, para.29.

⁴⁰ See Referral, KSC-CC-2019-07/F00001, paras 1.2-1.3, 4.2.

⁴¹ See Referral, KSC-CC-2019-07/F00001, para.2.10.

⁴² European Commission on Human Rights, *X v. Belgium*, no.7628/76, 9 May 1977; European Commission on Human Rights, *Colozza and Rubinat v. Italy*, nos 9024/80 and 9317/81, 5 May 1983. The 'cause' and 'nature' of the accusation encompasses the acts alleged and the legal characterisation of such acts (see e.g. *Mattoccia v. Italy*, para.59).

⁴³ Referral, KSC-CC-2019-07/F00001, para. 4.9, referring to Directive 2012/13/EU of the European Parliament and of the Council, 22 May 2012 ('EU Directive 2012/13'), para.28.

⁴⁴ EU Directive 2012/13, Art.6(1). See also para.28.

⁴⁵ EU Directive 2012/13, Art.6(3). See also para.28 ('taking into account the stage of the criminal proceedings when such a description is given').

of ongoing investigations.⁴⁶ Accordingly, nothing in the Directive supports the Applicant's attempt to rewrite the careful balance provided for in the Law and the KSC Rules.

25. Applying a framework which ignores the distinction between a fact-finding investigative stage and the point of committal for trial would be both unworkable and unwise, as, in many cases, it would: (i) seriously prejudice the conduct of ongoing investigations; (ii) be likely to result in unacceptable risks to the safety and well-being of witnesses, who may be readily identifiable from the specifics of the allegations; and (iii) be likely to result in tampering with and/or destruction of evidence. Moreover, during the investigative phase, the prosecution is engaged in precisely the fact-finding exercise of identifying what, if any, formal charges should be brought and is at all times analysing and re-analysing the available evidence. In such circumstances, requiring detailed notice of the nature and cause of charges, let alone disclosure of their underlying evidentiary basis, would not only be impossible, but is also unnecessary to fulfilling the primary purpose of Article 6(3)(a) of the ECHR, that is, to ensure the fairness of any subsequent trial proceedings.

2. The Applicant was provided with adequate information

26. In this case, the nature and timing of the information provided to the Applicant exceeded the requirements of the applicable legal framework, and was more than adequate to fully preserve and protect his fair trial rights.

27. In advance of the interview, the Applicant was informed in writing that there were grounds to believe that he had committed a crime within the jurisdiction of the Specialist Chambers.⁴⁷ That information was also subsequently confirmed in writing to the Applicant's Counsel in advance of the interview⁴⁸ and, together with the other

⁴⁶ EU Directive 2012/13, para.28.

⁴⁷ Annex 1 (summons dated 25 September 2019).

⁴⁸ Annex 2 (e-mail from the SPO to Counsel for the Applicant dated 14 October 2019 at 16:43).

rights under Article 38(3) of the Law, was orally explained to the Applicant at the outset of the interview, prior to the commencement of any questioning.⁴⁹

28. The Applicant was informed, both in writing through his Counsel prior to the date of the interview,⁵⁰ and orally at the outset of the interview,⁵¹ of the nature of the investigation being conducted, including the specific legal characterisation of the offences being investigated. In this regard, it is noted that the Referral significantly misrepresents the factual record in stating that neither the Applicant nor his Counsel were informed of the specific offence(s) alleged prior to the Interview commencing.⁵² While not required,⁵³ the SPO did in fact do so in this instance.

29. The Applicant was further informed, at the outset of the Interview, of the nature of the acts he was alleged to have committed.⁵⁴ Finally, the Applicant was also informed of the topics that the SPO intended to address during the course of the interview, and he was told that he would be permitted to consult with his counsel in private regarding any of the questions put to him during the course of the interview.⁵⁵

3. No prejudice to the fair trial rights of the Applicant has been demonstrated

30. The Applicant has failed to demonstrate that any prejudice would arise in the event of future trial proceedings against him. As outlined above, the Applicant was provided with adequate information in order to make an informed decision regarding exercise of his rights during the Interview, and did in fact fully exercise all rights

⁴⁹ Annex 3 (Transcript of interview dated 17 October 2019, Part 1, p.2).

⁵⁰ Annex 2 (e-mail from the SPO to Counsel for the Applicant dated 14 October 2019 at 16:43).

⁵¹ Annex 3 (Transcript of interview dated 17 October 2019, Part 1, p.2, lines 13-20).

⁵² Referral, KSC-CC-2019-07/F00001, para.1.3(a). *See also* Referral, KSC-CC-2019-07/F00001, para.2.17 (inaccurately and misleadingly stating that the SPO did not provide 'any information prior to the interview').

⁵³ *Contra*. Referral, KSC-CC-2019-07/F00001, para.2.11 (making an incorrect inference from the fact that the SPO provided such information in response to Counsel's request). Contrary to the Applicant's contention that such information was required to be contained in the interview summons, it is well-established that Article 6(3)(a) does not impose any special formal requirements regarding the manner or form in which information concerning the nature and cause of the charges is to be provided (ECtHR, *Pélissier and Sassi v. France*, para.53).

⁵⁴ Annex 3 (Transcript of interview dated 17 October 2019, Part 1, p.4, lines 21-24).

⁵⁵ Annex 3 (Transcript of interview dated 17 October 2019, Part 1, p.10, line 18-p.12, line 1).

available to him, including consulting with two Specialist Counsel and exercising his right to silence. Even if he were ultimately charged, there is no prejudice to him arising out of his invocation of the right to silence, as it is not a matter that can be considered in any future determination of his guilt or innocence.

31. Further, contrary to the Applicant's assertion that he could not be properly advised by Specialist Counsel,⁵⁶ having first provided the Applicant with all of the information outlined above, the SPO specifically offered the Applicant and his two Counsel the opportunity to break the Interview in order for them to consult in private. It was emphasised that they were welcome to take as long a break as was necessary for them to consult, noting that there was plenty of time as the interview had been scheduled to continue for a second day.⁵⁷ Despite Counsel for the Applicant acknowledging in the Interview that they had been provided with the information requested,⁵⁸ they declined to take more than a five minute break before returning to confirm an invocation of the right to silence.

32. For all of these reasons, the Applicant's claim should be rejected.

IV. CLASSIFICATION

33. Consistent with the Referral and the Summary Decision,⁵⁹ this response is filed as a public document. Also consistent with the Referral, the annexes are filed confidentially in order to, *inter alia*, protect the privacy of named staff members who are involved in ongoing investigations.

⁵⁶ Referral, KSC-CC-2019-07/F00001, paras 2.10, 4.7, 5.4.

⁵⁷ Annex 3 (Transcript of interview dated 17 October 2019, Part 1, p.12, lines 20-24 ('we're happy to break at any time, including right now, to give you time to consult about this. We're scheduled -- this interview is scheduled to go for the rest of the day and tomorrow. And if you need more time to consult, please take it now. Consult with your client.'), p.13, lines 3-5 ('Take as much time as you need, please. In that case, we'll take a short break for you to consult. Or a long break, as you please.')

⁵⁸ Annex 3 (Transcript of interview dated 17 October 2019, Part 1, p.12, lines 3-4 ('[t]his is precisely the information that we requested in our request to you.')).

⁵⁹ Summary Decision on the Prosecution Request to Reclassify the filing KSC-CC-2019-07/F00001, KSC-CC-2019-07/F00007, 20 November 2019 ('Summary Decision'), p.2.

V. RELIEF REQUESTED

34. For the foregoing reasons, the Panel should dismiss the Referral.

Word count: 4,397



Jack Smith

Specialist Prosecutor

Monday, 2 December 2019

At The Hague, the Netherlands