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:	**Special Counsel for Mr. Driton Lajci**
Date:	9 December 2019
Language:	English
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Defence Reply to the Prosecution Response to Mr. Driton Lajci's Referral to the Constitutional Court

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Specialist Prosecutor's Office	**Specialist Counsel for Mr. Driton Lajci**
Mr. Jack Smith	Mr. Toby Cadman

Introduction

1. On 2 December 2019, the Special Prosecutor's Office (SPO) filed its response to Mr. Driton Lajci's (the 'Applicant') Referral to the Constitutional Court Panel on the Legality of the Interview Procedure.

2. The Applicant seeks to make the following submissions in reply.

3. In doing so, the procedural history of this matter has been put in previous submissions, and therefore, is not repeated here.

The Response of the SPO

4. The SPO Response (the 'Response'), in essence, opposes the application on two main grounds, namely that:

   a) The application itself is inadmissible; and

   b) If deemed admissible, the application is without merit.

5. The Applicant rejects both positions as entirely lacking in substance and submits the following reply.

Inadmissibility

6. Insofar as the admissibility or otherwise of the Referral, the SPO highlights the following specific arguments:

   a) That the Applicant has failed to exhaust all available effective remedies;

b) That the Applicant has failed to identify either the ruling in issue or constitutional provision(s) said to have been violated;

c) The Constitutional Panel has no jurisdiction; and

d) The Applicant has no standing to make a referral.

Exhaustion of Effective Remedies

7. The SPO contends that 'all remedies provided by law' have not been exhausted,[1] and accordingly this renders the Applicant's filing inadmissible.

8. The Applicant rejects the contention of the SPO paragraphs 13 and 14 of the response, on the basis that although the powers contained under Article 39 of the Law, and Rule 48(2) of the Rules of Procedure and Evidence are accepted, the basis of the challenge filed is not an issue of whether the summons itself was unlawful and therefore the Prosecutor has failed to respond to the issue being argued.

9. Further, the SPO in their e-mail correspondence and again during the interview confirmed that there was no requirement within the KSC legal framework to disclose the information that was being requested, and that the challenge is to the rules and whether the legal framework is lawful taking into account the human rights protections and obligations under the Constitution, of the KSC.

10. Accordingly, it is respectfully submitted that the Pre-Trial Judge, or single Judge, is not empowered to rule on the challenge being made.

[1] Prosecution Response to Mr. Driton Lajci's Referral to the Constitutional Court KSC-CC-2019-07/F00008 – at paragraph 10

11. To the contrary, Article 113(7) of the Constitution of Kosovo reads:

> *"Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*[2]

12. The position advanced by the Applicant, is that his rights are being violated, and therefore, it is the Specialist Chamber of the Constitutional Court that is the correct venue with appropriate jurisdiction, rather than the pre-Trial Panel which, in our respectful submission, cannot rule on the legality and/or constitutionality or otherwise of the position adopted by the SPO.

13. The SPO in paragraph 13 of its Response, appears to be suggesting that at the point it became clear that no further information regarding the allegation i.e. its foundation, would be disclosed, that would be the point at which an application to the Pre-Trial panel or Single judge should be made.[3]

14. It naturally follows that the SPO appears to be suggesting that it would have been content for the interview to be stopped at that point, for a submission to be made to the pre-trial Chamber or single Judge.

15. This is, with respect, a wholly fanciful position to take, with there being no provision in the Law, or the Rules of Evidence and Procedure to do so. However, it is a matter of record that the requests were repeated at the interview and a request made to adjourn the interview to a later date. This was refused.

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[2] http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf
[3] This is deemed to be the appropriate juncture, given the date and time of interview would be last occasion that the SPO could disclose any information requested.

16. Accordingly, contrary to the position advanced at paragraph 15 of the SPO's Response, no such order/final ruling can be sought.

Limitation

17. At paragraph 12 of the Response, it is suggested that the requirement as per Rule 20(1) of the Rules, that any referral must be made within two (2) months, has not been met.

18. The SPO offers no basis for this submission, the response merely states that it hasn't been met. It is respectfully submitted that the SPO is factually and demonstrably wrong on this point.

19. As per the SPO's own 'procedural history' at paragraph 4, the Applicant was interviewed on 17 October 2019, with the Referral before the Constitutional Court being filed on 13 November. The intervening time period is therefore under 1-month.

20. It is therefore comfortably within the relevant time period.

21. Even if the relevant date is deemed to be the date of issuance of the summons, that being 25 September 2019, limitation would therefore expire on 25 November 2019. Again, the SPO is factually wrong in its submission, and therefore the response on this point is entirely without merit.

Merit of The Substantive Referral

22. With respect, the SPO appears to have misinterpreted that which is being argued by the Applicant.

23. Even if it is accepted, that in principle, the 'Law' and the 'KSC Rules' provide a framework that is consistent with the Constitution and applicable human rights law, it is respectfully submitted that it is the manner in which those obligations under the Law and the Rules have been interpreted that is at issue. The SPO has acted in such a way that has created a situation which is said to be incompatible, and therefore, merely citing the proposition that the law and the rules are compatible, does not prevent judicial scrutiny, nor does it answer the question as to whether their conduct was compatible with such fundamental principles. It is quite clear that such fundamental protections are central to the right to a fair trial, and it is incumbent upon the Court to conduct such an assessment.

24. The submission contrary to the position of the SPO at paragraph 18 of the Response, does not conflate two categories, nor is it "*without any basis in law or logic*".

25. Further, contrary to the position espoused at paragraph 19 of the SPO's response, there is no attempt to have Article 6(3) read wholesale into Article 38 of the Law, and to suggest the same is, with respect, a deliberate mischaracterization of the position.

26. The SPO appears to suggest in the first instance that Article 6 of the convention is of only limited value in terms of 'pre-trial' proceedings, and further, at paragraph 22, the SPO goes on to suggest that no authority has been provided that would support the content raised by the Applicant, and discounts the authority cited as not being relevant.

27. The simple position being advanced by the Applicant in this case, is, that for the purposes of the law, he is subject to a 'criminal charge' as per that authority cited.

28. Accordingly, he is therefore entitled to the protections afforded to someone subject to a 'criminal charge', one of those protections including the disclosure of the charge of which he is suspected of committing, and further, the basis and foundation of that charge.

29. It is accepted that there is a difference between the pre- and post-indictment phase and therefore, the obligations upon the Prosecution and/or investigative authority are different. However, the position of the SPO is that as it is at the investigatory stage, no suspect is entitled to know of the basis of the charge.

30. It is this that is argued to be incompatible.

31. At no time, has it been suggested that every detail ought to be disclosed, and therefore again, the position advanced at paragraph 25 of the SPO's response is a deliberate mischaracterization of the application.

32. At no stage has there been a suggestion that details of individual witnesses ought to be disclosed, and at no stage has it been suggested that evidence that would prejudice an investigation be disclosed.

33. The simple position, is that without having any knowledge of the basis and foundation of the charge against him, the Applicant was not able to make an informed decision at the interview stage, nor was specialist counsel in a position to properly advise the Applicant.

34. It is this, that it is suggested, that makes the current procedure incompatible and therefore unlawful, as highlighted within the authority cited, including the EU Directive which the SPO states should be discarded as it "*does not form part of the legal framework applicable to the Specialist Chambers*". The SPO cannot pick and choose legislation, directives, and convention. The European

Convention on Human Rights doesn't form part of the legal framework, however, the SPO and the KSC is still bound by it.

35. In any event, despite the position advanced at paragraph 24, the SPO is with respect incorrect in his interpretation.

36. If the SPO is to take the position that at no time will there be disclosure of any evidential basis prior to an interview, it is arguable that the entire provision of interviewing a suspect is moot.

Conclusion

37. It is of note that the SPO does not appear to address the substantive elements of the application, and rather, has intentionally, or inadvertently, exaggerated the position being advanced.

38. The SPO appears not to take issue with the definition of criminal charge, nor does the SPO address the relevant elements of the 'Law' and prefers instead to address the extent to which Article 6(3) applies at the pre-indictment, or interview stage.

39. Accordingly, and for clarity, as per the initial submissions of the Applicant, the position argued, is that to adopt a position that no information will be disclosed to a suspect, at all, prior to any interview, as was the case with the Applicant, is unconstitutional, is unlawful, and violates those human rights norms to which Kosovo, and therefore the KSC, is bound.

40. The starting point, is whether the Applicant, or indeed any such individual, is subject to a 'Criminal Charge', as per *Ibrahim and others v. The UK*[4] the Applicant, being a suspect, is deemed to be suspect to a criminal charge.

41. The second point therefore, is, having determined that the Applicant is subject to a Criminal Charge, whether those protections as per Article 6 of the Convention, and those protections contained within the 'Law' and the 'Rules of Evidence and Procedure', apply at the pre-indictment, or the investigatory stage.

42. The Application argues in the affirmative, as where an individual is subject to a criminal charge, he is required to be advised of the charge, and the basis of that charge.

43. It is entirely accepted that differing obligations apply pre- and post-indictment, and nowhere has it been suggested that the entire prosecution case needs to be disclosed at the interview stage, and to suggest otherwise, is, as previously outlined, a mischaracterization of the position.

44. Numerous states internationally, including the United Kingdom have a long accepted procedure that deals with the disclosure of information prior to an interview being commenced so as to enable an accused to make an informed decision, and further, to enable counsel, where instructed, to advise the suspect appropriately.

45. The extent to which such disclosure is made is left to the discretion of the officer conducting the interview. However, to adopt a blanket position that

[4] https://hudoc.echr.coe.int/eng#{"itemid":["001-166680"]}

no information need be disclosed at any time, is not a sustainable position, and is arguably an unlawful fettering of discretion.

46. The position advanced in the original submissions of the Application are therefore maintained, in that, the policy that no information need be disclosed is unlawful, and incompatible with relevant Human Rights law/norms. the Constitution, the Law, and the Rules of Evidence and Procedure.

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27 November 2019

At The Hague Netherlands