



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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: 17 December 2019

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Prosecution response to filing KSC-CC-2019-07/F00009

Specialist Prosecutor's Office

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1. Pursuant to the authorisation of the Panel,¹ the Specialist Prosecutor's Office ('SPO') hereby responds to the Reply² of Mr Driton Lajci ('Applicant'). The Reply further demonstrates the inadmissibility and lack of merit of the Referral.³
2. First, the powers of a Pre-Trial or Single Judge under Article 39 of the Law⁴ and Rule 48(2) of the KSC Rules⁵ are not confined to considering the legality of a summons.⁶ Rather, they expressly encompass, *inter alia*, 'such orders as may be necessary to assist the person in preparation of his or her defence'.⁷ That would clearly include issues relating to notice and/or disclosure. It was open to the Applicant to seek such a ruling at any time.⁸ The Applicant's unsupported assertion that a Pre-Trial or Single Judge is not empowered to rule on alleged violations of rights⁹ is contrary to the express provisions of the applicable legal framework and relevant jurisprudence.¹⁰ The Applicant has failed to exhaust the remedies available, and the Referral should be dismissed.¹¹

¹ Notice regarding Replying Submissions, KSC-CC-2019-07/F00011, 11 December 2019. For assignment of the panel to consider the matter ('Panel') *see* Decision to Assign Judges to a Constitutional Court Panel, KSC-CC-2019-07/F00002, 15 November 2019.

² Defence Reply to the Prosecution Response to Mr. Driton Lajci's Referral to the Constitutional Court, KSC-CC-2019-07/F00009, 9 December 2019 ('Reply').

³ 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').

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

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

⁶ *Contra*. Reply, KSC-CC-2019-07/F00009, para.8.

⁷ Law, Art.39(10).

⁸ *Contra*. Reply, KSC-CC-2019-07/F00009, paras 13-16. Additionally, the Applicant's submissions in relation to Rule 20(1) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court, KSC-BD-03/Rev1/2017, 21 July 2017 ('Rules') (Reply, KSC-CC-2019-07/F00009, paras 17-21) are non-responsive, focusing on calculating two months rather than the fact that no final ruling exists, from which to count the two month period.

⁹ Reply, KSC-CC-2019-07/F00009, paras 9-12.

¹⁰ See Prosecution response to Mr Driton Lajci's Referral to the Constitutional Court Panel on the Legality of the Interview Procedure, KSC-CC-2019-07/F00008, 2 December 2019 ('SPO Response'), para.10.

¹¹ SPO Response, KSC-CC-2019-07/F00008, paras 10-15.

3. Second, the Applicant now appears to imply that Article 6(3) of the European Convention on Human Rights ('ECHR') does not constitute the primary legal basis of his claim.¹² While he continues to assert that his rights are being violated,¹³ the Applicant still has not identified anywhere - either in the Referral or the Reply - the specific constitutional provisions he is alleging to have been violated. As the SPO previously indicated,¹⁴ that lack of clarity alone is further basis for dismissal of the Referral.

4. Moreover, the Applicant himself now concedes that (i) differing obligations apply pre- and post- indictment;¹⁵ (ii) details of individual witnesses, of evidence which would prejudice an investigation and of the scope of the prosecution case need not be disclosed at the interview stage;¹⁶ and (iii) the extent of disclosure at interview is a matter for the discretion of the officer conducting the interview.¹⁷

¹² Reply, KSC-CC-2019-07/F00009, paras 38-39 (seemingly taking issue with the fact that SPO submissions had focused on that provision).

¹³ Reply, KSC-CC-2019-07/F00009, para.12.

¹⁴ SPO Response, KSC-CC-2019-07/F00008, para.16. *See also* CCK, Case No. KI 58/17, *Constitutional review of Judgment Pml. No. 326/2016 of the Supreme Court of 23 January 2017*, 4 December 2017, para.64 ('it is up to the Applicant to state the violation of his constitutional rights and to indicate which Articles of the Constitution have been breached; to describe the circumstances of the violation related to the challenged act or decision; to specify how and why they were violated; to present relevant and pertinent evidence on how and why the violation was committed; to define the nature of the violation and to explain the constitutional implications of the violation; to substantiate with valid and compelling arguments that the actions of the public authority are contrary to the constitutional norms'); CCK, Case No.KI 78/13, *Roland Bartetzko, Constitutional Review of the Decision of the Panel for Conditional Release MD/CRP-No.474/12 dated 29 December 2012 and Administrative Instruction 2009/1 of Ministry of Justice*, 2 May 2014, paras 25, 30 ('[i]n sum, the Applicant has not shown how any of his rights, as guaranteed by the Constitution, have been violated. A mere statement that the Constitution has been violated cannot be considered as a constitutional complaint'; consequently finding the claim manifestly ill-founded and inadmissible); CCK, Case No. KI 154/15, *Constitutional review of Judgment PML. no. 67/2015 of the Supreme Court of Kosovo, of 9 July 2015*, 29 November 2016, para.46 ('[t]he Court notes that the Applicants have not brought before it a precise and concrete allegation on a violation of their rights and have not explained how and why the Judgment of the Supreme Court could have infringed their constitutional rights; they have only mentioned that there has been a violation of the constitutional rights. [...]').

¹⁵ Reply, KSC-CC-2019-07/F00009, paras 29, 43. With regard to the Applicant's claim that the SPO deliberately mischaracterised his prior submissions on this point (Reply, KSC-CC-2019-07/F00009, para.25), the SPO refers to, *inter alia*, paragraphs 3.7 and 4.2 of the Referral (putting forward the proposition that Article 21(4) rights be 'subsumed into' or 'incorporated into' Article 38).

¹⁶ Reply, KSC-CC-2019-07/F00009, paras 31-32, 43.

¹⁷ Reply, KSC-CC-2019-07/F00009, para.45.

5. The Applicant is being investigated for alleged offences against the administration of justice; it is self-evident that specific details of those allegations could not be disclosed at this stage without compromising potential witnesses and evidence. Further, as the SPO previously outlined,¹⁸ not only is such disclosure not necessary to fulfil the purposes of Article 6 of the ECHR, but an overly detailed specification of the nature and cause of charges at a fact-finding investigative stage could actually compromise those rights should a suspect wrongly conclude that the charges outlined comprise the full scope of his or her potential exposure, and decide to waive certain rights on that basis.¹⁹

6. Finally, the factual basis of the Referral also appears to have been reframed, towards an allegation that the SPO applies a 'blanket position that no information need be disclosed at any time'.²⁰ That allegation is (i) factually unfounded and untrue,²¹ and (ii) disproven by the record of the very case at hand.²² Notably, in the Reply, the Applicant does not dispute that he has suffered no prejudice;²³ when he was not provided additional information at his interview, he chose to invoke his right to silence, and therefore under the Law the interview, or non-interview, will have no

¹⁸ SPO Response, KSC-CC-2019-07/F00008, paras 20-25.

¹⁹ See *similarly* SPO Response, KSC-CC-2019-07/F00008, para.25 (further outlining why it would be both unworkable and unwise not to give due regard to the distinction between an investigative fact-finding stage and the point of committal for trial).

²⁰ Reply, KSC-CC-2019-07/F00009, paras 9, 29-30, 36, 39 ('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 [...]', 45-46. Compare submissions made in the Referral, KSC-CC-2019-07/F00001, paras 1.2-1.3.

²¹ What the SPO actually said is 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' (SPO Response, Annex 2, KSC-CC-2019-07/F00008/A02). That statement - which appears to be the primary factual basis of the Applicant's complaint (see Reply, KSC-CC-2019-07/F00009, para.9 (referring to the e-mail correspondence)) - is clearly confined to details of the underlying evidence, and even then provides no grounds to infer a blanket position.

²² See SPO Response, KSC-CC-2019-07/F00008, paras 27-29. *Contra. inter alia* Reply, KSC-CC-2019-07/F00009, para.33.

²³ SPO Response, KSC-CC-2019-07/F00008, paras 30-31.

consequences for him.²⁴ What remains is simply an abstract challenge,²⁵ for which the Applicant has no standing,²⁶ and the Panel should dismiss it accordingly.

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Tuesday, 17 December 2019

At The Hague, the Netherlands

²⁴ Law, Art.38(3). Prejudice would exist only if the Applicant claimed that he has a 'right' to be interviewed as a suspect, and to provide his information, at the investigation stage prior to charging. The Applicant has not advanced this argument, nor could he. It is not provided for in the Law nor in any other applicable legal instrument.

²⁵ Reply, KSC-CC-2019-07/F00009, paras 9 (referencing a challenge to the rules and whether the legal framework is lawful), 12 (referencing the 'legality and/or constitutionality' of the purported SPO position), 29-30, 36, 39, 45-46. *See also* SPO Response, KSC-CC-2019-07/F00008, para.16 (noting earlier submissions which were similarly unrelated to the Constitution and/or premature and abstract).

²⁶ *See, for example*, CCK, Case No. KI 102/17, *Constitutional review of Administrative Instruction no. 09/2015 on the categorization of users of contribution- payer pension according to the qualification structure and the duration of the payment of contribution pension experience of the Ministry of Labor and Social Welfare*, 13 February 2018, paras 19 ('[t]he Court reiterates that the constitutional text and the case law of this Court do not recognize the right of individuals to challenge *in abstracto* the acts of general character') and 20 ('[t]he Court reiterates that the Constitution of Kosovo does not provide for an *actio popularis*, meaning that individuals cannot complain in abstract or challenge directly actions or failure to act by public authorities.');

CCK, Case No. KI 78/13, *Roland Bartetzko, Constitutional Review of the Decision of the Panel for Conditional Release MD/CRP-No.474/12 dated 29 December 2012 and Administrative Instruction 2009/1 of Ministry of Justice*, 2 May 2014, paras 26-29. *See similarly*, European Court of Human Rights ('ECtHR'), *Burden v. The UK*, No. 13378/05, 29 April 2008, para.33; ECtHR, *SL v. Austria*, No. 45330/99, 22 November 2001, p.6; International Criminal Court, Appeals Chamber, *Prosecutor v. Lubanga*, ICC-01/04-01/06 OA 15 OA 16, 'Judgement on the appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"', 8 December 2009, para.110 ('[s]imilarly, as far as Mr Lubanga Dyilo's arguments regarding the purported violation of his fundamental rights are concerned, any discussion by the Appeals Chamber of the issues raised would be abstract and hypothetical').