



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

File number: KSC-CC-2020-08

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

Registrar: Fidelma Donlon

Date: 20 April 2020

Language: English

File name: Referral by [REDACTED] to the Constitutional Court Panel further to a decision of the Single Judge of the Kosovo Specialist Chambers

Classification: Public

Public Redacted Version of
Decision on the Referral of [REDACTED] Further to a Decision of the
Single Judge

Single Judge
Judge Nicolas Guillou

Applicant
[REDACTED]

Specialist Prosecutor
Jack Smith

The Specialist Chamber of the Constitutional Court

Composed of

Vidar Stensland, Presiding Judge

Roland Dekkers, Judge

Antonio Balsamo, Judge

Having deliberated remotely delivers the following Decision

I. PROCEDURE

A. REFERRAL

1. On [REDACTED], [REDACTED] (the “Applicant”) lodged with the Specialist Chamber of the Constitutional Court (the “Chamber”)¹ a referral dated [REDACTED] (the “Referral”),² referring to Article 113(2) and (7) of the Constitution of the Republic of Kosovo (the “Constitution”). The Applicant was represented by [REDACTED].³

2. In the Referral, the Applicant complained about a decision of the Single Judge of the Kosovo Specialist Chambers [REDACTED] (the “Decision”)⁴ refusing to reconsider his earlier denial of the Applicant’s request for leave to appeal.⁵ As a result, [REDACTED] orders⁶ issued previously with respect to the Applicant [REDACTED] ([REDACTED] the “Orders”) remained in force [REDACTED] (see paragraphs 13-14 below).

¹ With regard to assignment of the Constitutional Court Panel under Article 33(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (the “Law”), see [REDACTED]

² [REDACTED] (the “Referral”).

³ [REDACTED]

⁴ [REDACTED] (the “Decision”).

⁵ [REDACTED]

⁶ [REDACTED]; [REDACTED]

B. REQUEST FOR INTERIM MEASURES

3. On [REDACTED], the Applicant filed, pursuant to Rule 21(1) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (the “Rules”), a request for interim measures⁷ (the “Request”). The Applicant asked the Chamber to stay the Orders, pending a determination by the Chamber of the Referral.

C. STAY OF THE ORDERS

4. At the time of the receipt of the Request, the Chamber had no access to the Orders or any other relevant documents due to their security classification in the proceedings before the Single Judge. In fact, the Referral was the only document the Chamber had. As a result, the Chamber was unable to assess properly the Request, in compliance with Rule 21 of the Rules. It was also uncertain what impact [REDACTED] the Orders would have on the proper determination of the Referral. At the same time, it appeared from the Referral that [REDACTED]. Furthermore, the Referral appeared to raise an issue of the right to life under Article 2 of the European Convention on Human Rights (the “Convention”) (see paragraph 24 below).

5. In that light, the Chamber decided on [REDACTED] to “give such other directions as it considers necessary for the proper determination of the referral” pursuant to Rule 24 of the Rules. In particular, it stayed [REDACTED] the Orders until the Chamber decides on the Applicant’s Request for interim measures or until further order.⁸ The same day, the Chamber requested the Single Judge to grant access to the Orders and other documents so that the Chamber could examine the Request and the Referral.⁹

⁷ [REDACTED]

⁸ [REDACTED]

⁹ [REDACTED]

D. INTERIM MEASURE

6. On [REDACTED], the Single Judge granted the Chamber access to the Orders and other relevant documents.¹⁰ Hence, the Chamber was in a position to examine the Applicant's Request for interim measures properly.

7. [REDACTED]^[11]

8. In that light, the Chamber decided on [REDACTED] to suspend the Orders to the extent that [REDACTED], until the Chamber decides on the Referral or until further order. The Chamber rejected the Applicant's Request for interim measures in the remaining part.

E. WRITTEN SUBMISSIONS

9. On [REDACTED], the SPO and the Applicant filed their written submissions,¹² addressing the questions put by the Chamber pursuant to Rule 15(2) of the Rules.¹³

F. EXAMINATION OF THE REFERRAL

10. The Chamber now turns to the examination of the Referral based on the Referral, the Request, the documents provided by the Single Judge,¹⁴ including the Orders and the Decision, and the aforementioned written submissions of the SPO and the Applicant. The Chamber refers to the facts of the case and the submissions of the SPO and the Applicant in so far as relevant for the Chamber's assessment of the Referral.

¹⁰ [REDACTED]

¹¹ [REDACTED]

¹² [REDACTED] (the "SPO's submissions"); [REDACTED] (the "Applicant's submissions").

¹³ [REDACTED]; [REDACTED]

¹⁴ [REDACTED]

II. THE FACTS

A. SPO'S REQUESTS FOR INFORMATION

11. [REDACTED] ^[15]

12. [REDACTED] ^[16, 17]

B. ORDERS [REDACTED]

13. [REDACTED]

14. [REDACTED] ^[18]

C. SUBMISSIONS BEFORE THE SINGLE JUDGE

15. [REDACTED] ^[19]

16. [REDACTED]

D. DECISION OF THE SINGLE JUDGE

17. [REDACTED] ^[20]

18. [REDACTED]

19. [REDACTED]

E. APPLICANT'S ATTEMPTS TO APPEAL AGAINST THE DECISION

20. [REDACTED] ^[21]

¹⁵ [REDACTED]

¹⁶ See *ibid.*, para. 4, referring to [REDACTED]

¹⁷ [REDACTED]

¹⁸ [REDACTED]

¹⁹ [REDACTED]

²⁰ [REDACTED]

²¹ [REDACTED]

21. [REDACTED] ^[22, 23]

22. [REDACTED] ^[24]

23. On [REDACTED], the Single Judge refused to reconsider his earlier refusal of the Applicant's request for leave to appeal against his decision [REDACTED].²⁵ The Single Judge noted that reconsideration was an exceptional measure that could only be applied in case of a clear error of reasoning or where necessary to avoid injustice. In the present case, these conditions were not met. Consequently, the Orders at issue remained in force.

III. ALLEGED VIOLATIONS

24. The Applicant complained that, [REDACTED] the Single Judge had failed to assess their necessity and proportionality, and [REDACTED]. The disclosure of the information sought endangered the safety and privacy of [REDACTED], and was contrary to the law. The proceedings before the Single Judge had breached the requirements of fair trial. The Applicant invoked Articles 31 and 36(2) of the Constitution and Articles 2, 6 and 8 of the Convention.

IV. JURISDICTION

25. The Chamber observes that the Applicant lodged the Referral by reference to Article 113(2) and (7) of the Constitution.²⁶ In the Referral, the Applicant complained about the investigative measures as [REDACTED] confirmed by the Single Judge of the Kosovo Specialist Chambers. The Referral thus relates to the Specialist Chambers and Specialist Prosecutor's Office, as required by Article 162(3) of the Constitution and

²² [REDACTED]

²³ Ibid., paras 34, 40, 42.

²⁴ [REDACTED]

²⁵ [REDACTED]

²⁶ Referral, paras 15-16, 19.

Articles 3(1) and 49(2) of the Law. It follows that the Chamber has jurisdiction to rule on the Referral.

V. ADMISSIBILITY

A. THE SUBMISSIONS

1. The Applicant

26. With regard to its standing to lodge the Referral, the Applicant, firstly, submitted that, pursuant to Rule 4(b) of the Rules, this Chamber had jurisdiction over referrals made by “persons authorised to make referrals to the Kosovo Constitutional Court under Article 113 of the Constitution [...]”. Further, under Article 113(2) of the Constitution, the ‘Government’ was authorised to make referrals to the Constitutional Court. The Applicant was [REDACTED] and thus fell within the category of ‘Government’ under Article 113(2). Hence, it was authorised to lodge the Referral.²⁷

27. Secondly, it had standing to lodge the Referral on the “violations by public authorities of their individual rights and freedoms guaranteed by the Constitution” under Article 113(7) of the Constitution and Rule 20(1) of the Rules. It was also relevant that, in case no. KI 120/11 before the Kosovo Constitutional Court,²⁸ the Ministry of Health could lodge a referral by reference to Article 21(4) of the Constitution, which provides that “[f]undamental rights and freedoms [...] are also valid for legal persons to the extent applicable”. Hence, also the Applicant was entitled to lodge the Referral. The Applicant could claim to be a victim of the alleged violations of its rights guaranteed by the Constitution, and a victim of the alleged violations of the rights of [REDACTED] and were victims of the overreaching Orders.²⁹

²⁷ Referral, paras 13, 15, 19; Applicant’s submissions, paras 13, 15, 19.

²⁸ Kosovo, Constitutional Court, *Ministry of Health constitutional review of the decision of the Supreme Court A No. 551, dated 20 June 2011*, KI 120/11, Resolution on inadmissibility, 9 July 2012 (4 December 2012).

²⁹ Referral, paras 16-19; Applicant’s submissions, paras 16-19, 22-24.

28. Further, the Applicant argued that the proceedings before the Single Judge had breached the requirements of fair trial under Article 31 of the Constitution and Article 6 of the Convention. [REDACTED] ^[30]

29. The Applicant also indicated [REDACTED]. The Single Judge had incorrectly applied Article 2 of the Convention. He had also failed to consider that the [REDACTED] Order required the Applicant to violate its obligation under Article 8 to ensure the privacy of [REDACTED] ^[31]

2. The SPO

30. Firstly, with regard to the Applicant's standing to lodge the Referral under Article 113(2) of the Constitution, the SPO submitted that this provision was confined to the constitutional review of laws, decrees, regulations of the government and municipal statutes. It did not provide for the constitutional review of judicial rulings of the kind at issue.³²

31. Secondly, as regards Article 113(7) of the Constitution, the SPO submitted that the Applicant was not an 'individual', referred to therein, and could not lodge the Referral. In so far as Article 21(4) of the Constitution provided that "[f]undamental rights and freedoms [...] are also valid for legal persons to the extent applicable", this provision should be read as referring to non-governmental legal persons, that have standing to lodge a referral under Article 113(7). In contrast, [REDACTED] bodies may do so only in the situations specifically enumerated in the remainder of Article 113.³³

32. The SPO indicated that the aforementioned interpretation was consistent with the Convention, under which governmental organisations could not bring claims for

³⁰ Referral, paras 21-22, 24, 34; Applicant's submissions, paras 11, 25.

³¹ Referral, paras 26-33, 38, 40, 42, 46 *et seq.*; Applicant's submissions, paras 9, 11-12, 20-22, 27 *et seq.*

³² SPO's submissions, para. 19.

³³ *Ibid.*, paras 20-23.

violations of individual rights and freedoms.³⁴ The rationale for this restriction was to prevent public authorities from acting as both an applicant and respondent party before the Strasbourg Court. This rationale, the SPO argued, was relevant also in interpretation of Article 113(7) of the Constitution, which clearly envisaged public authorities as respondents in proceedings affecting the rights of individuals.³⁵

33. The SPO further maintained that, in determining the Applicant's standing to file the Referral, it was irrelevant that the Applicant could participate in the proceedings before the Single Judge. Furthermore, in those proceedings, the Applicant had asserted the right to privacy of other individuals. Hence, the present situation was different from those in cases nos KI 76/16³⁶ and KI 120/11,³⁷ where the Kosovo Constitutional Court accepted that the Government could refer matters under Article 113(7). In particular, in those cases, the Government had asserted violations of its own rights in the context of a civil litigation to which it had been a party.³⁸ In so far as the Applicant alleged the human rights violations of other individuals, it had no standing to litigate their rights.³⁹

B. THE CHAMBER'S ASSESSMENT

1. The Scope of Review

34. At the outset, the Chamber observes that, in the Referral, the Applicant stated its arguments for the examination by the Chamber essentially in the same manner as in its earlier application to the Single Judge for leave to appeal (see paragraph 20 above).

³⁴ Referring to Article 34 of the Convention.

³⁵ SPO's submissions, para. 24.

³⁶ Kosovo, Constitutional Court, *Constitutional review of decision rev. no. 41/2016 of the Supreme Court of Kosovo, of 14 March 2016*, KI 76/16, Resolution on inadmissibility, 16 September 2016 (7 November 2016), para. 44.

³⁷ Kosovo, Constitutional Court, KI 120/11, cited above, para. 40.

³⁸ SPO's submissions, paras 28-33.

³⁹ *Ibid.*, para. 21.

In this vein, the Applicant in some parts of the Referral appeared to argue before the Chamber that the conclusions of the Single Judge were wrong in terms of facts or law.⁴⁰

35. In that regard, the Chamber reiterates that, pursuant to Article 49(1) and (3) of the Law, the task of this Chamber is to assess whether the irregularities complained of by the Applicant violated its 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 unless and in so far as such errors may have infringed the fundamental rights and freedoms protected by the Constitution.⁴¹

36. It follows that it is not the Chamber's role to decide on whether the findings of the Single Judge were correct in terms of facts or law. Otherwise, the Chamber would be acting as an appeal chamber, which would be to disregard the limits imposed on its jurisdiction pursuant to Articles 113 and 162(3) of the Constitution.⁴² The Chamber may exceptionally question the findings in question where they are flagrantly and manifestly arbitrary, in a manner that gives rise in itself to a violation of the fundamental rights and freedoms guaranteed by the Constitution.⁴³

⁴⁰ See, for example, Referral, paras 39, 43. It is also noted that the Referral is entitled as '[REDACTED] application to appeal decision [...] of the Single Judge Panel [...]'].

⁴¹ KSC-CC-2019-07, F00013, Decision on the referral of Driton Lajci concerning interview procedure by the Specialist Prosecutor's Office, public, 13 January 2020, para. 18 (the "*Decision on the referral of Driton Lajci*"); KSC-CC-2019-05, F00012, Decision on the referral of Mahir Hasani concerning Prosecution order of 20 December 2018, public, 20 February 2019, para. 50 (the "*Decision on the referral of Mahir Hasani*"). See ECtHR, *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 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. 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.

⁴² See ECtHR, *Kemmache v. France* (no. 3), 24 November 1994, Series A no. 296-C, para. 44. See Kosovo, Constitutional Court, *Constitutional review of Judgment Pml No. 41/2017 of the Supreme Court of the Republic of Kosovo of 3 July 2017*, KI 119/17, Resolution on inadmissibility, 3 April 2019 (3 May 2019), para. 87; KI 37/18, cited above, paras 38-39.

⁴³ See ECtHR, *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, ECHR 2007-I, para. 89. See Kosovo, Constitutional Court, KI 37/18, cited above, para. 41; *Constitutional review of Judgment of*

37. However, before the Chamber can examine the Referral in so far as it alleges the violations of the constitutional rights, the Chamber must first ascertain whether the Referral is admissible.

2. Findings on Admissibility

(a) Standing to Lodge the Referral

(i) Whether the Applicant is 'Authorised Party'

38. The Chamber reiterates that, pursuant to Article 113(1) of the Constitution, it "decides only on matters referred to [it] [...] by *authorised parties*". (emphasis added) The Applicant argued that it was an 'authorised party' on two grounds.

39. Firstly, the Applicant relied on Article 113(2) of the Constitution, which in so far as relevant in the present case reads as follows:

[...] the Government [...] are authorised to refer the following matters to the Constitutional Court:

- (1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;
- (2) the compatibility with the Constitution of municipal statutes.

40. With regard to Article 113(2), the Applicant submitted that it should be considered as 'Government' and thus as authorised to make the Referral. The Chamber notes that the 'Government' is also mentioned as authorised party in Article 113(3) of the Constitution, which in its relevant part reads as follows:

[...] the Government are authorised to refer the following matters to the Constitutional Court:

- (1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;
- (2) compatibility with the Constitution of a proposed referendum;
- (3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;
- (4) compatibility of a proposed constitutional amendment [...] and the review of the constitutionality of the procedure followed;

Supreme Court in Pkl no. 45/12 dated 18 June 2012, KI 85/12 and KI 86/12, Resolution on inadmissibility, 21 January 2013 (22 January 2013), para. 28.

(5) questions whether violations of the Constitution occurred during the election of the Assembly.

41. The Chamber is doubtful that the Applicant, as [REDACTED], may be considered as 'Government' in the above provisions. In this regard, the Chamber notes that the Constitutional Court in case no. KO 124/19 found that the Government had made a referral in that case as an authorised party under Article 113(2), (3) where the referral had been filed on its behalf by the Prime Minister of Kosovo.⁴⁴ In this connection, it is relevant to note that, indeed, pursuant to Article 94(1) of the Constitution, the Prime Minister represents the Government. Also in another case, no. KO 98/11, the Prime Minister had lodged a referral on behalf of the Government.⁴⁵ However, in the present case, the Applicant did not specify on what legal basis it submitted the Referral as the 'Government'.

42. In any event, the issues raised in the Referral do not fall within any of the matters that the 'Government' is authorised to refer to the Constitutional Court pursuant to paragraph (2) of Article 113 or its paragraph (3) for that matter.⁴⁶ The Referral does not concern the compatibility with the Constitution of laws, decrees, regulations or statutes as provided for in Article 113(2); or matters of conflict or compatibility, or questions as provided for in Article 113(3). It concerns the investigative measures ordered and subsequently confirmed by the Single Judge.

43. In this connection, it is unclear for the Chamber whether or not the Applicant asserted that, under Rule 4(b) of the Rules, it had standing to lodge the Referral irrespective of the matters raised as long as it was an 'authorised party' under

⁴⁴ Kosovo, Constitutional Court, *Request for interpretation of the act of resignation of the Prime Minister of the Republic of Kosovo and definition of the competencies and functioning of the Government after the resignation of the Prime Minister*, KO 124/19, Resolution on inadmissibility, 4 September 2019 (16 September 2019), paras 1, 35.

⁴⁵ Kosovo, Constitutional Court, *Concerning the immunities of deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and members of the Government of the Republic of Kosovo*, KO 98/11, Judgment, 20 September 2011, para. 1.

⁴⁶ See Kosovo, Constitutional Court, KO 124/19, cited above, paras 38, 50.

Article 113 (see paragraph 26 above). Either way, the Chamber must note, for the sake of completeness, that Rule 4(b) deals with referrals made “pursuant to Article 49(2) of the Law”, which in turn refers to Article 113 of the Constitution. It follows that the Referral must meet the requirements of Article 113 of the Constitution.

44. As noted above, the relevant paragraphs (2) and (3) of Article 113 authorise the ‘Government’ to refer to the Constitutional Court only certain specified matters (see paragraph 42 above). The Applicant has not made the Referral on any of those matters. It follows that, regardless, the Applicant is not entitled to make the present Referral pursuant to Article 113(2), invoked by the Applicant, or Article 113(3) of the Constitution.

45. Secondly, the Applicant relied on Article 113(7) of the Constitution, which in its relevant part reads as follows:

Individuals are authorised to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution [...]

46. The Chamber notes that Article 113(7) authorises ‘individuals’ to make referrals. In this regard, it is relevant that, pursuant to Article 21(4) of the Constitution, “[f]undamental rights and freedoms [...] are also valid for legal persons to the extent applicable”. Further, [REDACTED], the Applicant has a legal personality.

47. In relation to the SPO’s argument that Article 21(4) of the Constitution refers to non-governmental legal persons, the Chamber observes that a different view emerges from the case law of the Kosovo Constitutional Court.

48. In particular, the Constitutional Court has considered a possibility that also public-law legal persons may have standing to file a referral under Article 113(7) as read with Article 21(4) of the Constitution. For instance, in case no. KI 76/16, the Government had lodged a referral based on the said Constitution provisions in relation to proceedings concerning compensation for expropriated property. The Constitutional Court did not find that the Government was not authorised to make

the referral under Articles 21(4) and 113(7). Instead, it dismissed the referral as manifestly ill-founded.⁴⁷

49. Similarly, the Constitutional Court did not find that certain other public-law legal persons were not authorised to file referrals under Articles 21(4) and 113(7). For example, the Ministry of Agriculture, Forestry and Rural Development – Kosovo Forestry Agency, or Ministry of Health in relation to employment proceedings (cases nos KI 89/14 and KI 120/11),⁴⁸ or Kosovo Privatisation Agency in relation to proceedings for compensation of income (cases nos KI 37/14 and KI 59/16)⁴⁹ or damages (case no. KI 120/14).⁵⁰ In some other cases, the Constitutional Court took a similar approach to referrals filed by municipalities based on Articles 21(4) and 113(7) of the Constitution in relation to proceedings concerning contractual obligations (case no. KI 31/18),⁵¹ employment issues (case no. KI 07/10)⁵² or compensation for expropriated property (joined cases nos KI 48/14 and KI 49/14).⁵³

⁴⁷ Kosovo, Constitutional Court, KI 76/16, cited above, paras 1, 4, 25-26, 30-45.

⁴⁸ Kosovo, Constitutional Court, *Constitutional review of the judgment rev. no. 287/2013 of the Supreme Court of 18 December 2013*, KI 89/14, Resolution on inadmissibility, 11 February 2015 (20 March 2015), paras 1, 4, 40-46; KI 120/11, cited above, paras 1, 4, 24, 28, 30-41.

⁴⁹ Kosovo, Constitutional Court, *Request for constitutional review of the judgment of the Special Chamber of the Supreme Court of Kosovo AC-II-12-0078 of 23 January 2014*, KI 37/14, Resolution on inadmissibility, 25 March 2014 (14 April 2014), paras 1, 4, 22-23, 37; *Constitutional review of decision AC-I-15-0237 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Privatisation Agency Related Matters of 18 February 2016*, KI 59/16, Resolution on inadmissibility, 25 March 2014 (1 August 2016), paras 1, 6, 22, 38.

⁵⁰ Kosovo, Constitutional Court, *Request for constitutional review of the judgment of the District Commercial Court in Pristina II C no. 79/2009 of 27 October 2009 and judgment of the Appellate Court of Kosovo Ae no. 45/2012 of 20 May 2013*, KI 120/14, Resolution on inadmissibility, 12 February 2015 (2 March 2015), paras 1, 4, 19, 23. See also *Constitutional review of the decision of the Special Chamber of the Supreme Court of Kosovo, ASC-09-089, dated 4 February 2010*, KI 25/10, Judgment, 30 March 2011 (31 March 2011).

⁵¹ Kosovo, Constitutional Court, *Constitutional review of judgment E rev. no. 20/2017 of the Supreme Court of Kosovo of 20 November 2017*, KI 31/18, Judgment, 12 April 2019 (23 April 2019), paras 1, 5, 110-113.

⁵² Kosovo, Constitutional Court, *Constitutional review of decision of the Independent Oversight Board of Kosovo no. 112/08, dated 5 June 2009*, KI 07/10, Resolution on inadmissibility, 13 December 2010 (16 December 2010), paras 1, 28-30.

⁵³ Kosovo, Constitutional Court, *Constitutional review of the decisions of the Basic Court in Mitrovica - Branch in Vushtrri and decision Ac no. 1369/14 of the Court of Appeal of Kosovo of 27 June 2014*, KI 48/14 and KI 49/14, Resolution on inadmissibility, 15 March 2016 (26 April 2016), paras 1, 6, 49, 59, 63-65.

50. In view of the foregoing, the Chamber finds it difficult to accept the SPO's argument that, as a matter of principle, public-law legal persons cannot rely on Article 113(7) as read with Article 21(4) of the Constitution. At the same time, the Chamber considers that it does not need to decide on this issue in the present case, since in any event the Referral is inadmissible for the following reasons.

(ii) Whether the Applicant Enjoys the Rights Under the Constitution

51. The Chamber notes that, pursuant to Article 113(7) of the Constitution, individuals are authorised to refer violations "of *their* individual rights and freedoms guaranteed by the Constitution [...]". Further, Article 21(4) provides that "[f]undamental rights and freedoms [...] are also valid for legal persons *to the extent applicable*". (emphasis added) It follows that the Applicant is entitled to file the Referral only if it actually enjoys the allegedly violated fundamental rights and freedoms. If the Applicant cannot enjoy them, either in general or in the specific circumstances of the case, the Chamber must dismiss the Referral.

52. In this regard, the Chamber notes that historically human rights developed in order to protect human beings against arbitrary exercise of State power. Hence, the State, as a legal person under public law *par excellence*, has a duty to secure the fundamental rights and freedoms. The Applicant in the present case is a public-law entity that exercises governmental power. Thus, it also has a duty to ensure human rights. [REDACTED]

53. In view of the foregoing, there are less strong reasons for extending the fundamental rights and freedoms to legal persons under public law than to legal persons under private law, which may play an important role in the exercise of the fundamental rights and freedoms by human beings. This is even more so when a legal person under public law operates as an authority in power or, in other words, within the framework of its authoritative tasks, in the public interest and in pursuance of public goals. To say that a public-law entity when acting from a position of power

enjoys fundamental rights and freedoms would be at odds with their very purpose, which is to protect the individual from arbitrary exercise of such power.

54. In that connection, the Chamber recalls that [REDACTED]. The Applicant's role, tasks and powers reveal its predominantly public-law character.

a. Right to Privacy and Right to Fair Trial Under the Constitution

55. The Chamber observes that, in view of the Applicant's predominantly public-law character, it does not entail a group of individuals who freely associate and function for their personal interests. On the contrary, the Applicant is a means of exercising public power, from which the right to privacy under Article 36 of the Constitution serves to ensure protection.⁵⁴ This idea is enshrined also in paragraph (2) of Article 36 of the Constitution, invoked by the Applicant, in that it provides for safeguards for searches of "any *private* dwelling or establishment". (emphasis added) The Kosovo Constitutional Court has also noted the applicability of this provision to searches of *private* dwelling or establishment.⁵⁵

56. The Applicant itself submitted before the Chamber and the Single Judge that it had a duty to respect, *inter alia*, the right to privacy of individuals (see paragraphs 20 and 29 above). It also disputed the [REDACTED] Order by reference to its public mandate [REDACTED] (see paragraph 29 above). It follows that the Applicant asserts the right to privacy as an authority in power. Thus, the Chamber is unable to accept

⁵⁴ Also in relation to Article 8 of the Convention, the European Court of Human Rights (the "ECtHR") has stated that "[t]he *essential object* of Article 8 is to protect the individual against arbitrary interference by public authorities". (emphasis added) See *P. and S. v. Poland*, no. 57375/08, 30 October 2012, para. 94. See also *Nunez v. Norway*, no. 55597/09, 28 June 2011, para. 68.

⁵⁵ Kosovo, Constitutional Court, *Constitutional review of the Judgment of the Supreme Court Pml no. 83/2013, dated 19 June 2013*, KI 129/13, Resolution on inadmissibility, 10 September 2013 (9 October 2013), paras 55-56.

that the Applicant [REDACTED] enjoys the right to privacy under Article 36 of the Constitution.⁵⁶

57. As regards the right to fair trial under Article 31 of the Constitution, the Chamber observes that the Applicant argued [REDACTED]

58. It thus emerges that what is at issue here is a disagreement by one authority on whether another authority has admissibly interfered with the sphere of its authoritative functioning. Given this specific nature of the issue, the Chamber is not persuaded by the Applicant's argument (see paragraph 27 above) that the present case is similar to case no. KI 120/11 before the Kosovo Constitutional Court, where the Ministry of Health, as an applicant in that case, alleged a violation of the right to fair trial with regard to employment proceedings, to which it had been a party.⁵⁷ As noted above, the Applicant in the case at hand pursues protection of its authoritative functioning.⁵⁸

59. At the same time, the Chamber is mindful that, in case no. KI 25/10, the Constitutional Court accepted that the right to fair trial under Article 31 of the Constitution applied to a public-law entity, namely the Privatisation Agency of Kosovo (the "PAK"). However, that case originated from proceedings to which the PAK should have been a party.⁵⁹ This is not the situation here. Under the Law and the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, the Applicant did not have the status of a party to the proceedings, in which the Single Judge decided on the SPO's applications for the Orders. In addition, the Chamber cannot overlook the nature of the proceedings before the Single Judge. In particular,

⁵⁶ By way of comparison, see Slovenia, Constitutional Court, *Review of constitutional complaints of Bank of Slovenia and European Central Bank*, U-I-157/16, Up-729/16, Up-55/17, Order, 19 April 2018, para. 25.

⁵⁷ Kosovo, Constitutional Court, KI 120/11, cited above, paras 1, 3-4, 9-14.

⁵⁸ By way of comparison, see Slovenia, Constitutional Court, *Review of constitutional complaints of Bank of Slovenia and European Central Bank*, U-I-157/16, Up-729/16, Up-55/17, Order, 19 April 2018, paras 27-29.

⁵⁹ Kosovo, Constitutional Court, KI 25/10, cited above, paras 1, 5, 17, 39, 45, 48, 51-52.

they concerned investigative measures. There was no issue of a criminal charge against the Applicant.⁶⁰ Nor did they concern relations that would resemble relations of a civil-law nature in any way. Furthermore, and unlike in case no. KI 25/10, the Single Judge provided the Applicant with some opportunity to make submissions (see paragraph 15 above).

60. In view of the foregoing, the Chamber is unable to accept that, in the circumstances of the present case, the Applicant is entitled to claim a violation of the right to fair trial under Article 31 of the Constitution.

b. Right to Privacy and Right to Fair Trial Under the Convention

61. The Applicant alleged the violation of the right to fair trial and the right to privacy also by reference to Articles 6 and 8 of the Convention (see paragraphs 24, 28-29 above). In this regard, the Chamber reiterates that, by virtue of Article 22(2) of the Constitution, the Convention applies at the constitutional level.⁶¹ However, under a well-established case law of the ECtHR, 'governmental organisations' have no standing to make an application pursuant to Article 34 of the Convention.⁶² The Applicant is a public-law entity that exercises governmental authority. Hence, it is a 'governmental organisation' and, as such, is not entitled to assert the rights under the Convention as incorporated under Article 22(2) of the Constitution.

(iii) The Alleged Violations of the Rights of Individuals

62. Lastly, the Chamber observes that the Applicant submitted that it was a victim of the alleged violations of the fundamental rights and freedoms of [REDACTED] under Articles 31 and 36 of the Constitution and Articles 2, 6 and 8 of the Convention

⁶⁰ Contrast with *Decision on the referral of Mahir Hasani*, paras 30-32.

⁶¹ See *Decision on the referral of Driton Lajci*, para. 14. See Kosovo, Constitutional Court, *Ćemailj Kurtiši and the Municipal Assembly of Prizren*, KO 01/09, Judgment, 27 January 2010 (18 March 2010), para. 40.

⁶² ECtHR, *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II, para. 148; *Municipal Section of Antilly v. France* (dec.), no. 45129/98, ECHR 1999-VIII. See also *Radio France and Others v. France* (dec.), no. 53984/00, ECHR 2003-X, para. 26.

(see paragraphs 27-29 above). In this regard, the Chamber notes that the Applicant cannot claim to be a victim of these alleged violations merely on the grounds that the individuals concerned [REDACTED] (see paragraph 27 *in fine* above). Furthermore, the Applicant did not claim that it was nominated to represent these individuals pursuant to Rule 20(2) of the Rules.⁶³

3. Overall Conclusion

63. Having regard to the foregoing, the Chamber finds that, in the circumstances of the present case, the Applicant is not authorised to lodge the Referral under Article 113(2), (3) or (7) of the Constitution, irrespective of the importance of the issues it may raise. Therefore, the Referral does not fall within the scope of the Chamber's jurisdiction as provided for in Article 113 of the Constitution. The Chamber cannot examine the issues raised unless they have been referred to it in a legal manner by authorised parties.⁶⁴

64. It follows that the Chamber must dismiss the Referral pursuant to Article 49(2), (3) of the Law and Rules 4(b), (c) and 14(a) of the Rules for lack of the Applicant's standing to lodge the Referral.

65. The Chamber adds that its above findings are without prejudice to procedural rights the Applicant may have under the Law or the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers. This decision only entails that, in the circumstances of the case, the Applicant does not have standing to lodge the present Referral with the Chamber.

⁶³ See, for example, European Commission on Human Rights, *Ayuntamiento de M. v. Spain*, no. 15090/89, Commission decision of 7 January 1991, Decisions and Reports (DR) 68, p. 209. Compare and contrast with Kosovo, Constitutional Court, *Constitutional review of Judgment rev no. 182/2012 of the Supreme Court of 20 June 2013*, KI 30/18, Decision to reject the referral, 11 June 2018, para. 2; *Constitutional review of Judgment PA1 no. 313/16 of the Court of Appeals of 10 May 2016*, KI 16/18, Decision to reject the referral, 22 November 2018 (31 December 2018), para. 1.

⁶⁴ See Kosovo, Constitutional Court, KO 124/19, cited above, para. 55

VI. CLASSIFICATION

66. With regard to security classification of this decision, the Chamber reiterates that public character of its records is directly linked to the fundamental principle enshrined in Article 31(2) and (3) of the Constitution that justice be administered in public. This fundamental principle protects the persons concerned against the administration of justice in secret with no public scrutiny. It is also one of the means whereby confidence in the Chamber can be maintained. Public records are essential for maintaining the transparency of the Chamber's written proceedings.⁶⁵

67. At the same time, the Chamber deems it justified to depart from the public character of its records in the present case. In particular, it is necessary to classify this decision as strictly confidential in order to protect [REDACTED].⁶⁶ The Chamber shall review this classification as soon as no longer necessary in the interests of investigation. However, until such time, the Chamber must ensure that this decision is available for public scrutiny to the extent that the interests of investigation require otherwise. Therefore, it will consider making this decision available in a public redacted version.

⁶⁵ *Decision on the referral of Driton Lajci*, para. 32.

⁶⁶ See *ibid.*, para. 33.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

1. *Declares* the Referral filed by [REDACTED] on [REDACTED] inadmissible;
2. *Confirms* that the interim measure ordered on [REDACTED] expires with immediate effect pursuant to Rule 21(6) of the Rules.



Vidar Stensland
Presiding Judge

Done in English on Monday, 20 April 2020
At The Hague, the Netherlands