



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

File number: KSC-BC-2020-06

Before: The President of the Specialist Chambers
Judge Ekaterina Trendafilova

Registrar: Fidelma Donlon

Date: 24 August 2021

Language: English

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Decision on Application for the Recusal of the President

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THE PRESIDENT of the Specialist Chambers (“President”), noting Articles 32(3) and 33 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”), Rules 13(1)(a)-(c), (e), 20(1)-(3) and 82(3) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules” and “KSC”, respectively) and Rules 3 and 4 of the Rules on the Assignment of Specialist Chambers Judges from the Roster of International Judges (“Rules on Assignment”), herewith renders this decision on the request of Mr Hashim Thaçi (“Accused”) for the recusal of the President (“Application”).¹

I. PROCEDURAL BACKGROUND

1. On 23 July 2021, the Pre-Trial Judge rendered the decision on Mr Thaçi’s review of detention, in which, he ordered, *inter alia*, his continued detention (“Detention Decision”).²
2. On 28 July 2021, the Defence filed a request for an extension of time to appeal the Detention Decision (“Extension of Time Request”).³
3. On 29 July 2021, the President assigned a Court of Appeals Panel to rule on the Extension of Time Request (“Assignment Decision”).⁴ In the Assignment Decision, the President, having considered the principles and criteria set out in Rule 4 of the Rules on Assignment, “including relevant experience and expertise as well as [the Judges’] availability at this time”, assigned Judges Michèle Picard, Emilio Gatti and Nina

¹ F00434, Thaçi’s Defence Application for the Recusal of the President Ekaterina Trendafilova from assigning a Court of Appeals Panel to adjudicate Mr Thaçi’s appeal on provisional release with confidential Annex 1 and Public Annex 2, 16 August 2021.

² F00417/RED, Public Redacted Version of Decision on Review of Detention of Hashim Thaçi, 23 July 2021, para. 64.

³ IA010/F00001, Thaçi Defence Request for an Extension of the Time Limit to Submit its Appeal against the Pre-Trial Judge’s Decision on Review of Detention of Hashim Thaçi, 28 July 2021.

⁴ IA010/F00002, Decision Assigning a Court of Appeals Panel to Consider Request Regarding Time Limits, 29 July 2021.

Jørgensen to decide on the Extension of Time Request.⁵

4. On 16 August 2021, the Defence filed an appeal against the Detention Decision (“Detention Appeal”).⁶

5. On the same day, the Defence filed the Application.

II. DISCUSSION

6. At the outset, the President recalls that she ruled on a similar application for her recusal/disqualification in the case of the *Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj* (“Disqualification Decision”), wherein based on analysis of relevant legal texts and jurisprudence, it was decided that she is competent to rule on the application.⁷ The same line of reasoning and conclusion applies to the present Application.

A. Timeliness of the Application

7. In the Application, Mr Thaçi’s Defence argues that:

The present request [Application] for recusal is timely, despite the information having been previously available, because the President can only be asked to recuse herself from fulfilling a judicial role as provided in Rule 20(1) when she is serving in [a] judicial capacity in the case. The President’s judicial capacity in the present case commenced with the filing of Mr. Thaçi’s appeal on provisional release, which was filed simultaneously with the present [Application].⁸

8. With respect to the timing of the Application, the Defence suggests that such assessment starts as of the filing of the Detention Appeal. This stance in the Application stands to be corrected.

⁵ IA010/F00002, Decision Assigning a Court of Appeals Panel to Consider Request Regarding Time Limits, 29 July 2021, para. 5.

⁶ IA010/F00004, Thaçi Defence Appeal against Decision on Review of Detention of Hashim Thaçi, 16 August 2021.

⁷ KSC-BC-2020-07/F00272, Decision on the Application for Recusal or Disqualification, 6 August 2021.

⁸ Application, para. 28.

9. According to Rule 20(3) of the Rules, a request for disqualification should be filed “immediately”, and not later than “ten (10) days *after the grounds on which the application is based become known to the Party*” (emphasis added). This practically means that the “interested Party [in this case the Defence,] acts instantly as soon as it becomes aware of the basis for the [Application], be it through a public source or otherwise but no later than ten (10) days. The ten-day deadline is indicative of the maximum time frame within which a Party may submit an application pursuant to Rule 20 of the Rules”.⁹

10. Upon a review of the Application and the annexes appended thereto, it is clear that the arguments are based on the President’s participation in two diplomatic briefings in December 2020 and in February 2021, respectively, as well as her Assignment Decision. As the Defence acknowledges, the occurrence of the two diplomatic briefings has been known to it for several months.¹⁰

11. Next, arguments proffered by the Defence are directed at the President’s supposed “removal” of a particular Judge from the Court of Appeals Panel. Thus, following this argument, the time limit would have commenced not with the Detention Appeal, but rather with the Assignment Decision which was issued 18 days before the filing of the present Application. It follows that the Application is filed out of time and on this basis could be dismissed. Nevertheless, the President will address the Defence allegations for the sake of the integrity of the proceedings before the KSC, the transparency vis-à-vis the public and the interests of justice.

B. Recusal/Disqualification of the President

12. In the Application the Defence requests:

[T]he President to assign the present [Application] for recusal to the Vice-President, pursuant to Rule 20(6) of the Rules;

⁹ Disqualification Decision, para. 6.

¹⁰ Application, para. 27.

[T]he Vice-President to assign a Panel of three Judges to adjudicate the [Application] for recusal, pursuant to Rule 20(3) of the Rules; and
[T]he recusal of Judge Trendafilova, President of the Kosovo Specialist Chambers, from the specific judicial task of assigning a Court of Appeals Panel to adjudicate Mr Thaçi's appeal on provisional release, pursuant to Article 33(1)(c) of the KSC Law, and Rule 169 of the Rules.¹¹

13. In this respect, the President notes that throughout the Application as well as in the relief sought, the Defence refers to "recusal" of the President as opposed to her disqualification. It is worth recalling that in the context of Rule 20 of the Rules, "recusal" is a voluntary act of a Judge sitting on a particular case, where he or she has reasons to believe that a ground for recusal exists, while "disqualification" is triggered by an application or request from a Party to the proceedings.¹² In the relief sought the Defence seeks, *inter alia*, the assignment of a Panel of three Judges to "adjudicate the request for recusal".¹³ However, Rule 20(3) of the Rules is very clear that an assignment of a Panel of three Judges, as requested by the Defence, is provided only "to determine whether the Judge should be *disqualified*" (emphasis added).

14. Having clarified the above, it should be emphasised that the President may recuse herself if deemed necessary pursuant to Rule 20 of the Rules only insofar as it relates to her judicial functions, rather than her administrative functions.¹⁴ In other words, if the President were to "sit in a case".¹⁵ This is the scenario stipulated in Article 33(6), first sentence of the Law, which states that "[t]he President of the Specialist Chambers shall be the Presiding Judge on any Supreme Court Panel upon which he or she sits". Any other function vested on the President by virtue of the Law and the Rules, including the assignment of Judges to Panels pursuant to Article 33(1) of the Law, falls under her judicial administration authority regulated in Articles 32(3) and 33 of the Law and Rule 13 of the Rules.

¹¹ Application, para. 44. See also Application, paras 1, 17.

¹² Rule 20(1)-(3) of the Rules.

¹³ Application, para. 44.

¹⁴ Disqualification Decision, para. 19.

¹⁵ Rule 20(1) of the Rules.

15. The distinction between the President's judicial and administrative role, including of assigning Judges to Panels, is further demonstrated in Article 33(6), second sentence of the Law, according to which even when the President is disqualified from hearing a matter or has other reasons not to sit on the Supreme Court Panel, the President retains her authority to assign a Judge to replace her on that Panel. It follows that the President cannot recuse herself or be disqualified from exercising her assignment duties as the Defence requests, under Rule 20 of the Rules.

16. In this context, the President recalls the Disqualification Decision, wherein she stated with reference to jurisprudence on the matter, that "neither the Law nor the Rules foresee disqualification by a party of the President exercising his or her administrative authority, let alone the issuance of prospective decisions and orders".¹⁶ Accordingly, the Application could be dismissed on this basis alone. Nonetheless, for the reasons set out in paragraph 11, the President will address the Defence allegations.

17. Before turning to the factual allegations in the Application, the President finds it important to address the following element of the Application. Throughout its Application, the Defence relies heavily on information allegedly related to the diplomatic briefings, despite acknowledging that the source of this information is *unknown*.¹⁷ The President recalls that it is for the party alleging bias to adduce credible, reliable and sufficient evidence to rebut that presumption, for no Judge may be disqualified on the basis of sweeping or abstract allegations that are neither substantiated nor detailed.¹⁸

C. Defence Allegations

18. Having addressed the above preliminary matters, the President turns to the factual allegations. The Defence claims that: 1) the President's participation in and

¹⁶ Disqualification Decision, paras 19, 22 and the case law in support provided in fn. 29.

¹⁷ Application, paras 31, 33.

¹⁸ See Disqualification Decision, para. 31 and citations therein.

statements made at the diplomatic briefings in December 2020 and February 2021 affect her impartiality; 2) the “*ex parte* submissions” made by the Specialist Prosecutor in the presence of the President about the Accused’s provisional release and his ability to threaten and intimidate witnesses, affect the fairness of the proceedings and the President’s impartiality;¹⁹ and 3) the President’s decision not to assign a particular Judge to the Court of Appeals Panel to decide on the Extension of Time Request raises doubts again about her impartiality as “a reasonable observer would apprehend bias to remove only [him from hearing] Mr. Thaçi’s second appeal on provisional release”.²⁰

19. The President notes at the outset that there is no dispute that the diplomatic briefings took place. Such meetings are no secret and the KSC has consistently and transparently reported about them. The Defence refers in this respect to a purported summary of the December 2020 diplomatic briefing with most European Union Member States, Contributing States, as well as the United Kingdom mission in Kosovo, which, as acknowledged by the Defence, is from an *unidentified source*. Suffice to say that the document from this unidentified source is not an official transcript of the briefing. Indeed, such a transcript does not exist and the veracity of the contents of the purported summary can thus not be verified. That it is neither an official transcript nor an accurate depiction of the President’s update is clear from the fact that, at times, this document inaccurately attributes entire passages to the President’s presentation and incorrectly reflects what was said.

20. The President recalls that providing updates to the diplomatic community as well as assigning Judges to particular Panels all pertain to the President’s judicial administration role – one of the core functions entrusted upon her by virtue of Articles 32(3) and 33 of the Law and Rule 13 of the Rules.

¹⁹ Application, paras 2-5, 11, 16, 30-37, 41-42.

²⁰ Application, paras 9-10, 43.

21. The Defence submits that such meetings have an impact on the impartiality of the President. More specifically, the Defence claims that the Specialist Prosecutor made comments in the presence of the President on the provisional release of Mr Thaçi and its potential impact on witness's protection.²¹ The Defence complains that this happened "in the absence of, and without the knowledge of any of the accused or their counsel".²² The Defence further asserts that the President did not distance herself from these comments or "gave any indication that this was inappropriate or improper for a Judge to be present".²³ Moreover, such comments, the Defence submits "send[...] a message to Judge Trendafilova and to all of the judges of the Specialist Chambers: if you dare grant provisional release to Mr. Thaçi, the KSC's international sponsors will hold you personally responsible for any difficulties encountered by any witness".²⁴

22. In support of their assertions, the Defence relies on different disciplinary codes, case-law of some domestic jurisdictions and regional jurisprudence from the European Court of Human Rights, as well as one decision from the International Criminal Court on the prohibition of "*ex parte* communications".²⁵ According to the Defence, *ex parte* communications are prohibited "except when specifically authorised by law" and "only if there is prompt *post facto* notification of the communication to the other party".²⁶ The submissions indicate that the foregoing comments, defined by the Defence as "*ex parte* communications" by the Specialist Prosecutor to the President who was present at the briefing, have "in the eyes of an objective observer tainted Judge Trendafilova's participation in the context of Mr. Thaçi's provisional release".²⁷

23. The suggestion by the Defence that comments made by the Specialist

²¹ Application, paras 2-5, 30, 35-37, 41-42.

²² Application, para. 30.

²³ Application, para. 37.

²⁴ Application, paras 2-3.

²⁵ Application, paras 12-15.

²⁶ Application, para. 11.

²⁷ Application, paras 10-11 and particularly 16.

Prosecutor in the presence of the President during this meeting affect her impartiality or that of the Judges of the KSC is unreasonable and without merit.

24. Appearances before diplomatic missions during which the Principals provide updates on matters relevant to each organ are a routine practice at other institutions, which are similarly financed by international or regional bodies and/or States. These standard annual events are reflected in the KSC annual reports, and accordingly, are publicly well-known. Next, the KSC and the Specialist Prosecutor's Office ("SPO") are two independent institutions as Article 24(1) of the Law clearly provides. Accordingly, the President has no involvement in nor authority over the Specialist Prosecutor, including on the Specialist Prosecutor's decision to update the diplomatic community or the content of his statements. In a similar vein, the asserted silence on the part of the President cannot be understood as acquiescence with the Specialist Prosecutor. There is simply no need for the President to distance herself from updates made by the Specialist Prosecutor on his intended filings. Particularly, where those updates are made in accordance with the KSC's legal framework.

25. Moreover, the assertion that the Specialist Prosecutor made "*ex parte* communications" to the President is misleading. The update provided by the Specialist Prosecutor was not directed to the President, nor was it meant to elicit any response or action on her part; it was an update by the Specialist Prosecutor to the members of the diplomatic community at a meeting where she too was present, along with the Registrar.

26. The Defence suggestions that any comments made by the Specialist Prosecutor during the diplomatic briefing influence the President and the Judges of the KSC and also send a message amounting to warnings to the President and the Judges in the presence of "diplomats (who represent the [KSC's] sponsors and financial backers)",²⁸

²⁸ Application, para. 3.

unreasonably questions the integrity of the President and the Judges. Such allegations are contrary to the very foundations upon which judicial systems are built, namely the independence and impartiality of Judges. As previously found, the presumption of impartiality cannot easily be rebutted²⁹ and the submissions by the Defence in relation to the President fail to meet this threshold.

27. The President also recalls in this respect that decisions on review of detention are ruled upon by an independent Panel whose impartiality is presumed. In case of doubt, the KSC legal framework provides for a procedure to rebut the presumption of impartiality. Thus, the Defence arguments should be dismissed.

28. The President further notes the case-law cited by the Defence,³⁰ which, however, is inapplicable to the present circumstances. As stated above, the President in assigning a Panel acts in her administrative capacity, whereas the jurisprudence relied upon by the Defence relates only to Judges acting in their judicial capacity when “sitting in a case”.

29. The Defence submits that the President “removed” a particular Judge from the Court of Appeals Panel assigned to decide the Extension of Time Request,³¹ suggesting that her decision “was linked to his previously expressed openness to the prospect of interim release of Mr Thaçi”.³² According to the Defence, the President’s “*ex parte*” communications with the Specialist Prosecutor during her presence at diplomatic

²⁹ See Disqualification Decision, para. 31; ICC, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case No. ICC-02/11-01/15, Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motion, 31 March 2021, para. 177; STL, *The Prosecutor v. Salim Jamil Ayyash*, Case No. STL-11-01/A-1/OTH/R25, Decision on Ayyash Defence Application for the Disqualification of Judge Riachy, 3 February 2021, para. 8; IRMCT, *Prosecutor v. Milan Lukić*, Case No. MICT-13-52-R.1, Decision on Request for Disqualification, 28 October 2020, para. 11; ECCC, Case No. 002/31-10-2019-ECCC/SC (03), Decision on Khieu Samphan’s Application for Disqualification of Six Appeal Judges who Adjudicated in Case 002/01, 14 July 2020, para. 64; ECHR, *Case of Micallef v. Malta*, Application No. 17056/06, Judgment, 15 October 2009, para. 94; ECHR, *Case of Indra v. Slovakia*, Application No. 46845/99, Judgment, 1 February 2005, para. 49.

³⁰ See Application, paras 13-15.

³¹ Application, para. 9.

³² Application, para. 10.

briefings where [the Specialist Prosecutor] made [the] submissions [referred to above], would cause a reasonable observer to believe that the removal of [a particular] Judge [...] was deliberate”,³³ to prevent him from “hear[ing] Mr Thaçi’s second appeal on provisional release”.³⁴

30. The President recalls in this respect that Judges are appointed to the Roster of International Judges and are not permanently allocated to Panels. Judges are assigned to proceedings or phases of proceedings by the President only where needed by virtue of Article 33 of the Law and in accordance with criteria set out in the Rules on Assignment, which provide the President with a margin of discretion. The Judges’ assignment ends with the pronouncement of the Panel on the specific subject matter *sub judice*, rather than the Judges being “removed” as the Defence asserts.³⁵

31. The President further recalls that she has thus far established various compositions of Court of Appeals Panels out of the same four Judges. The allegation that the President intentionally removed a specific Judge is therefore at odds with the existing practice.

III. CONCLUSION

32. In view of the foregoing, the request for the recusal or disqualification of the President and assigning such a request to the Vice-President, pursuant to Rule 20(6) of the Rules must be dismissed. Since the President is not subject to recusal or disqualification pursuant to Rule 20 of the Rules for exercising her judicial administration role, she retains competence to continue exercising her functions in accordance with the KSC legal framework. It follows that the second and third reliefs pertaining to assigning a Panel of three Judges by the Vice-President to adjudicate the Application and the recusal of the President from assigning a Court of Appeals Panel

³³ Application, para. 10.

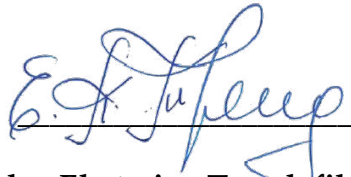
³⁴ Application, para. 43.

³⁵ See Article 30(3) of the Law.

to adjudicate the Detention Appeal must also be dismissed.

IV.DISPOSITION

33. For the foregoing reasons, the President hereby:
- a) **DISMISSES** the Application in its entirety in accordance with paragraph 32 of the present decision; and
 - b) **ORDERS** the Registrar to reclassify as public the Application (F00434).



**Judge Ekaterina Trendafilova,
President of the Specialist Chambers**

Dated this Tuesday, 24 August 2021
At The Hague,
The Netherlands