

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

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Veseli Defence Reply to SPO Response to Filing KSC-BC-2020-06/F00474

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I. INTRODUCTION

1. The Issue as defined in F00474 is appealable. It arises from the formalistic analysis of Article 103(7) in the Impugned Decision.¹ Such a formalistic analysis was erroneous because it failed to consider that a court that applies a separate substantive law may be regarded as “extraordinary,” in violation of Article 103(7).
2. To reiterate, it was not sufficient for the purposes of Article 103(7) for the Court to find that the court was established by *a* law. Given the primacy of the Constitution,² a court must be established by a law which is constitutionally sound. The corollary is that a court established by a constitutionally unsound law is not established by law. In this instance, the law at issue (*i.e.* the KSC Law, the “Law”) violates (*inter alia*) the constitutional right to equal protection.³
3. Case no. K026/15 did not dispose of the issue because the Law was not before the Court. The Pre-Trial Judge did not dispose of the issue in the Impugned Decision because he did not engage with it. The Jurisdictional Decision does not remedy the problem because it addresses a different – albeit related – issue. There is therefore a discrete appealable issue⁴ arising from the Impugned Decision which needs to be addressed.

II. SUBMISSIONS

4. The SPO fails to appreciate the significance of the Issue. The Defence stressed in its original motion that “the distinction between a specialised court and an extraordinary one is not merely semantic but has significant repercussions on

¹ F00450, Decisions on Motions Challenging the Legality of the SC and SPO and Alleging Violations of the Certain Constitutional Rights of the Accused, para. 113.

² Article 16, Constitution of Kosovo.

³ F00224, Preliminary motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the basis of violations of the Constitution, 15 March 2021, para. 6.

⁴ F00474, para. 5 (referring to para. 113 of the Impugned Decision).

the right to fair trial and *the right to equality before the law of the accused*" (emphasis added).⁵ The introduction of a separate substantive law can in principle engage this constitutional right and, the Defence submits, the Law does violate this right.

5. As the Defence has made clear, reliance on the overall finding of the Constitutional Court in Case no. KO26/15 regarding the proposed constitutional amendment cannot be extended to the KSC Law because the proposed constitutional amendment and the Exchange of Letters (as well as in the text of Judgment KO26/15 itself) point to the conclusion that the Constitutional Court did not anticipate that the court would operate on the basis of a different substantive law.⁶ It could not have been assumed that the KSC Law would impose substantive law not available in ordinary courts. To do so would raise questions of *jus de non evocando* and create a situation of unequal application of law,⁷ which is a matter of constitutional concern that engages the fundamental rights of the Accused.
6. The Defence does not dispute that there is some overlap between some of the issues in the Jurisdictional challenge and the Impugned Decision. However, the present Issue is distinct.⁸ Whereas Ground 4 of the Jurisdictional challenge concerns the difference in treatment in the delivery of the principle of legality,⁹ the present Issue deals with the interpretation of Article 103(7) of the Constitution, *i.e.*, the nature and constitutionality of this Court *vis-à-vis* other Kosovo courts. This necessarily entails a consideration of whether the Law

⁵ F00224, Preliminary motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the basis of violations of the Constitution, 15 March 2021, para. 6.

⁶ F00224, para. 3.

⁷ F00224, paras. 17, 6.

⁸ F00010, Veseli Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 27 August 2021, Grounds 3 and 4.

⁹ F00010, para. 42.

gives rise to a difference in treatment between Mr Veseli and other persons tried or currently being tried by other Kosovo courts.

7. In any event, the Defence submits that it is not for the SPO to decide on the prerogatives of the Court of Appeals Chamber. The nature of other grounds of appeal currently before the Court of Appeals Chamber is not determinative of the outcome of the present Application, but instead, concerns the merits of the eventual issue to be determined by the relevant Panel of the Court of Appeals Chamber.

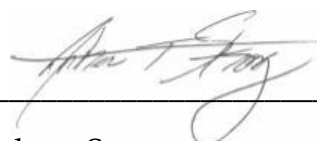
III. CONCLUSION

8. For the foregoing reasons, the Defence respectfully requests the Pre-Trial Judge to grant the Application.

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