



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

File number: KSC-CC-2022-15

Before: **The Specialist Chamber of the Constitutional Court**

Judge Vidar Stensland, Presiding

Judge Roumen Nenkov

Judge Romina Incutti

Registrar: Fidelma Donlon

Date: 15 March 2022

Language: English

File name: Referral by Hashim Thaçi to the Constitutional Court Panel Concerning the Fundamental Rights to an Independent and Impartial Tribunal Established by Law and to a Reasoned Opinion

Classification: Public

Decision on Further Submissions

Applicant

Hashim Thaçi

Specialist Prosecutor

Jack Smith

I. REFERRAL

1. On 28 February 2022, Mr Hashim Thaçi (the “Applicant”) lodged with the Specialist Chamber of the Constitutional Court a referral, dated 28 February 2022 (the “Referral”),¹ under Article 113(7) of the Constitution of the Republic of Kosovo (the “Constitution”) and Article 49(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (the “Law”). The Applicant is represented by Mr Gregory W. Kehoe.

2. In the Referral, the Applicant raises several constitutional complaints in relation to the criminal proceedings against him, taking place before the Specialist Chambers.

3. Firstly, the Applicant submits that the charges against him exceed the scope of the Council of Europe Parliamentary Assembly Report Doc. 12462 of 7 January 2011 (the “Report”),² which, pursuant to the Constitution and the Law, limits the Specialist Chambers’ jurisdiction. As the Specialist Chambers thus do not have jurisdiction to adjudicate the charges against him, the Applicant’s fundamental right to be tried by a tribunal “established by law” under Article 31(2) of the Constitution and Article 6(1) of the European Convention on Human Rights (the “Convention”) has been breached.³

4. Secondly, the Applicant complains that, when he challenged the Specialist Chambers’ jurisdiction before the Court of Appeals panel, it failed to address an important Applicant’s argument. In particular, that, if the Specialist Chambers’ jurisdiction is not limited to the specific allegations contained in Report, it is not a “specialised court” permitted by Article 103(7) of the Constitution, but an

¹ KSC-CC-2022-15, F00001, Referral to the Constitutional Court Panel on the Violation of Mr Thaçi’s Fundamental Rights to an Independent and Impartial Tribunal Established by Law, and to a Reasoned Opinion, public, 28 February 2022.

² Council of Europe Parliamentary Assembly, Report Doc. 12462, Inhuman treatment of people and illicit trafficking in human organs in Kosovo, 7 January 2011.

³ Referral, paras 4-7, 26-27, 35, 43-44.

“extraordinary court” prohibited by Article 103(7). The Applicant submits that, by failing to address that argument, the Court of Appeals panel breached the Applicant’s fundamental right to a reasoned opinion under Article 6(1) of the Convention.⁴

5. Thirdly, the Applicant complains that the Court of Appeals panel that decided his interlocutory appeal had been constituted in breach of the Law, as it was not the same panel that had been assigned to decide his very first interlocutory appeal. In particular, the Applicant argues that, under the Law, the President must assign a Court of Appeals panel until the completion of an appeals phase of the case and not only until the appeals panel decides the respective interlocutory appeal. The Applicant complains that his right to an “independent and impartial” tribunal under Article 31(2) of the Constitution and Article 6(1) ECHR has been violated, given that such separate assignments allow the President to influence the appeals panel.⁵

6. In relation to the first and second constitutional complaints, the Applicant states that, on 12 March 2021, he filed a preliminary motion challenging the jurisdiction of the Specialist Chambers.⁶ On 22 July 2021, the pre-trial judge dismissed this motion.⁷ On 27 August 2021, the Applicant appealed against the pre-trial judge’s decision.⁸ On 23 December 2021, the Court of Appeals panel denied the Applicant’s appeal.⁹ In that light, the Applicant submits that he has exhausted all available legal remedies.¹⁰

⁴ Referral, paras 58-64.

⁵ Referral, paras 45-47, 49-50.

⁶ Referral, paras 7, 11, referring to KSC-BC-2020-06, F00216, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, public, 12 March 2021.

⁷ Referral, paras 7, 13, referring to KSC-BC-2020-06, F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, public, 22 July 2021.

⁸ Referral, paras 7, 14, referring to KSC-BC-2020-06, IA009, F00012, Taçi Defence Appeal Against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, public, 27 August 2021.

⁹ Referral, paras 7, 15, referring to KSC-BC-2020-06, IA009, F00030, Decision on Appeals Against “Decision on Motions Challenging the Jurisdiction of the Specialist Chambers”, public, 23 December 2021.

¹⁰ Referral, paras 7, 65.

7. In relation to his third constitutional complaint, the Applicant states that, on 16 August 2021, he filed a request to recuse the President from appointing an appeals panel to decide his appeal on provisional release.¹¹ On 24 August 2021, the President dismissed this request.¹² Subsequently, the Applicant filed two applications. In particular, on 31 August 2021, he requested the reconsideration of the said President's decision.¹³ Further, on 6 September 2021, he requested the disqualification of a judge from the appeals panel deciding the Applicant's appeals on provisional release, and on the Specialist Chambers' jurisdiction,¹⁴ as this judge had not been assigned to an appeals panel that had decided the Applicant's first interlocutory appeal. The Applicant requested that the initial appeals panel assigned on 4 February 2021 be reinstated.¹⁵ On 17 September 2021, the President dismissed these Applicant's requests.¹⁶ In this regard, the Applicant submits that he has exhausted all available legal remedies as regards the assignment of the appeals panel.¹⁷

8. Further, the Applicant submits that he has filed his constitutional complaints timely, within two months of the notification of the appeals panel's decision of 23 December 2021 (see paragraph 6 above), in compliance with Rule 20(1)(b), (2) of the

¹¹ Referral, para. 66, referring to KSC-BC-2020-06, F00434, Thaçi 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, public, 16 August 2021, with Annex 1, confidential, and Annex 2, public.

¹² Referral, para. 66, referring to KSC-BC-2020-06, F00440, Decision on Application for the Recusal of the President, public, 24 August 2021.

¹³ Referral, para. 66, referring to KSC-BC-2020-06, F00449, Thaçi Defence Request for Reconsideration of the 24 August 2021 Decision on Application for the Recusal of the President, public, 31 August 2021.

¹⁴ Referral, para. 66, referring to KSC-BC-2020-06, F00457, Thaçi Defence Application for the Disqualification of Judge Emilio Gatti from the Court of Appeals Panel Adjudicating Mr Thaçi's Appeals on Provisional Release and Jurisdiction, Annulment of the Decisions of the President Nos. KSC-BC-2020-06/IA010/F00005 and KSC-BC-2020-06/IA009/F00015, dated 26 August 2021 and 30 August 2021, Respectively, and the Reinstatement of the Court of Appeals Panel Appointed by the President by Decision KSC-BC-2020-06/IA004/F00002, dated 4 February 2021, to Rule on Mr Thaçi's Appeals on Provisional Release and Jurisdiction, public, 6 September 2021 ("Disqualification Application"), with Annex 1, confidential, and Annex 2, public.

¹⁵ Disqualification Application, paras 7, 45, referring to KSC-BC-2020-06, IA004, F00002, Decision Assigning a Court of Appeals Panel, public, 4 February 2021.

¹⁶ Referral, para. 66, referring to KSC-BC-2020-06, F00476, Decision on Applications for Reconsideration and Disqualification of a Judge from a Court of Appeals Panel, public, 17 September 2021.

¹⁷ Referral, para. 66 *in fine*.

Rules of Procedure for the Specialist Chamber of the Constitutional Court (the “Rules”).¹⁸

II. FURTHER SUBMISSIONS

9. As regards its examination of the Referral, the Chamber notes that, pursuant to Rule 15(2) of the Rules, the Panel may request additional information or submissions, as deemed necessary, in relation to the Referral. Pursuant to Rule 15(3), any responding submissions directed by the Panel shall be filed within the time limits set by the Panel. Also, under Article 35(2)(i) of the Law, where the referral concerns pursuance of an indictment filed by the Specialist Prosecutor’s Office (the “SPO”), the SPO has the authority to respond to the referral.

10. In that light, the Chamber finds it appropriate to invite the SPO and the Applicant to file written submissions, should they wish so to do, in relation to the Referral. Pursuant to Rule 15(2) of the Rules, the Chamber deems it necessary that the written submissions address specific questions as set out in this decision. After the SPO files its written submissions, the Applicant may file his written submissions on the questions specified in this decision and/or comment on the SPO’s written submissions. In this connection, the Chamber notes that it will disregard any unsolicited submissions.

11. The Chamber reiterates that this decision, including the specific questions put to the SPO and the Applicant, are without prejudice to its determination of the Referral, including to any findings it may make as regards its admissibility or merits.

¹⁸ Referral, paras 18-19, 67.

FOR THESE REASONS,

The Constitutional Court Panel

1. *Invites* the SPO and the Applicant to file written submissions, should they wish so to do, in relation to the Referral, addressing the following questions:
 - a. Is the Referral admissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rules 14 and 20 of the Rules?
 - b. May the Applicant, at the present stage of the criminal proceedings against him and absent conviction, claim to be a victim of the alleged violations of Article 31(2) of the Constitution and Article 6(1) of the Convention?
 - c. Given that the criminal proceedings against the Applicant are still ongoing, is it still open to the Applicant to raise his complaints, under Article 31(2) of the Constitution and Article 6(1) of the Convention, in relation to the Specialist Chambers' jurisdiction, before the trial panel, and, subsequently, and as the case may be, before the Court of Appeals panel, under Article 46 of the Law, and the Supreme Court panel, under Article 47 or Article 48(6)-(8) of the Law? Are these remedies to be exhausted for the purposes of Article 113(7) of the Constitution and Article 49(3) of the Law?
 - d. Which is the final ruling concerning the Applicant's alleged violation, under Article 31(2) of the Constitution and Article 6(1) of the Convention, as regards the assignment of the Court of Appeals panel, pursuant to Rule 20(1)(b) of the Rules?
 - e. Do the Applicant's complaints as regards the Specialist Chambers' jurisdiction, reasoning by the Court of Appeals panel, and the assignment of the Court of Appeals panel give rise to the appearance of a violation of Article 31(2) of the Constitution and Article 6(1) of the Convention?

2. *Directs* that, in case the SPO wishes to file written submissions on the above questions, it shall do so by **29 March 2022**; and in case the Applicant wishes to file written submissions on the above questions and/or comment on the SPO's written submissions, if any, he shall do so by **5 April 2022**;
3. *Directs* that the SPO's written submissions shall not exceed 20 pages; and the Applicant's written submissions shall not exceed 15 pages.



Vidar Stensland
Presiding Judge

Done in English on Tuesday, 15 March 2022
At The Hague, the Netherlands