



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

In: KSC-CC-2022-15

Before: **The Specialist Chamber of the Constitutional Court**
Judge Vidar Stensland, Presiding
Judge Roumen Nenkov
Judge Romina Incutti

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 29 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**

**Corrected version of 'Prosecution Response to Decision on Further Submissions
in Relation to Thaçi Referral (KSC-CC-2022-15/F00004)'
with public annex 1**

Specialist Prosecutor's Office
Jack Smith

Applicant
Hashim Thaçi

I. INTRODUCTION

1. Pursuant to Article 49(3) of the Law,¹ Rules 14 and 20 of the Rules,² and Article 113(7) of the Constitution of Kosovo ('Constitution'), the Specialist Prosecutor's Office ('SPO') hereby responds to the questions contained in the Decision³ issued by the Specialist Chambers Constitutional Court ('SCCC') concerning Thaçi's Referral.⁴

2. As explained below, the Referral is wholly inadmissible for at least three, independent reasons. First, Thaçi has failed to exhaust all other remedies prior to bringing his claims to the SCCC, as is required. Second, the jurisprudence concerning the two fair trial provisions that Thaçi's arguments rely on—Constitution Article 31(2) and European Convention on Human Rights ('ECHR') Article 6(1)—makes clear that the relevant analysis must take account of the totality of the proceedings. As a result, Thaçi's claims are premature at this early stage in the case against him. And, third, Thaçi fails to make a *prima facie* showing of a constitutional violation for any of his claims. In addition, Thaçi's claim regarding the composition of the Court of Appeals Panel is time-barred, as are his joinder requests.

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ('Law').

² Rules of Procedure for the Specialist Chamber of the Constitutional Court ('Rules'). All references to 'Rule' or 'Rules' refer to these rules unless otherwise noted.

³ Decision on Further Submissions, KSC-CC-2022-15/F00004, 15 March 2022 ('Decision').

⁴ 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, KSC-CC-2022-15/F00001, 28 February 2022 ('Referral').

II. PROCEDURAL HISTORY

3. On 12 March 2021, Thaçi filed a preliminary motion challenging the jurisdiction of the Kosovo Specialist Chambers ('KSC').⁵ On 23 April 2021, the SPO filed three responses to the accused's preliminary motions.⁶ Thaçi replied on 14 May 2021.⁷

4. On 22 July 2021, the Pre-Trial Judge ('PTJ') issued his Decision on Motions Challenging the Jurisdiction of the Specialist Chambers.⁸

5. On 16 August 2021, Thaçi filed an Application seeking to have the KSC President recused from assigning a Court of Appeals Panel for Thaçi's appeal concerning provisional release.⁹ That request was denied on 24 August 2021.¹⁰

6. On 27 August 2021, Thaçi filed his appeal.¹¹ On 30 August 2021, the President of the Specialist Chambers appointed an Appeals Panel.¹²

7. On 31 August 2021, Thaçi filed a request for reconsideration of the decision regarding recusal of the President from selecting a Court of Appeals Panel.¹³ On 6

⁵ Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, KSC-BC-2020-06/F00216, 12 March 2021.

⁶ Prosecution response to preliminary motions concerning Council of Europe Report, investigation deadline, and temporal mandate, KSC-BC-2020-06/F00259, 23 April 2021; Prosecution response to preliminary motion concerning applicability of customary international law, KSC-BC-2020-06/F00262, 23 April 2021; Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00263, 23 April 2021.

⁷ Thaçi Defence Reply to "Prosecution response to preliminary motions concerning Council of Europe Report, investigation deadline, and temporal mandate", KSC-BC-2020-06/F00304, 14 May 2021; Thaçi Defence Reply to "Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE)", KSC-BC-2020-06/F00306, 14 May 2021.

⁸ Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021.

⁹ 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 With Confidential Annex 1 and Public Annex 2, KSC-BC-2020-06/F00434, 16 August 2021.

¹⁰ Decision on Application for the Recusal of the President, KSC-BC-2020-06/F00440, 24 August 2021.

¹¹ Thaçi Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/IA009/F00012, 27 August 2021.

¹² Decision Assigning a Court of Appeals Panel, KSC-BC-2020-06/IA009/F00015, 30 August 2021.

¹³ Thaçi Defence Request for Reconsideration of the 24 August 2021 Decision on Application for the Recusal of the President, KSC-BC-2020-06/F00449, 31 August 2021.

September 2021, Thaçi filed a motion for disqualification of Judge Gatti, annulment of the recusal decisions, and appointment of a new appeals panel.¹⁴ On 17 September 2021, the reconsideration, disqualification, and recusal requests were denied.¹⁵

8. On 15 October 2021, the SPO filed its corrected response to the Thaçi appeal.¹⁶ On 18 October 2021, Thaçi replied.¹⁷

9. On 23 December 2021, the Court of Appeals Panel issued its Appeals Decision.¹⁸

10. On 28 February 2022, Thaçi filed the Referral. On 1 March 2022, the President of the Specialist Chambers appointed the SCCC Panel.¹⁹

11. On 10 March 2022, the SCCC Panel issued the Decision on Working Language and Further Proceedings.²⁰ In it, the Panel held that the working language would be English. It also found that requesting further submissions was appropriate, and stated that it would issue a decision regarding the specifics of the additional submissions

¹⁴ 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 With Confidential Annex 1 and Public Annex 2, KSC-BC-2020-06/F00457, 6 September 2021.

¹⁵ Decision on Applications for Reconsideration and Disqualification of a Judge from a Court of Appeals Panel KSC-BC-2020-06/F00476, 17 September 2021.

¹⁶ Corrected Version of Prosecution response to Thaçi Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers (IA009-F00021 dated 30 September 2021) with public Annex 1, KSC-BC-2020-06/IA009/F00021/COR, 15 October 2021.

¹⁷ Thaçi Defence Reply to 'Prosecution response to Thaçi Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers', KSC-BC-2020-06/IA009/F00025, 18 October 2021.

¹⁸ Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", KSC-BC-2020-06/IA009/F00030, 23 December 2021 ('Decision on Appeal').

¹⁹ Decision to Assign Judges to a Constitutional Court Panel, KSC-CC-2022-15/F00002, 1 March 2022.

²⁰ Decision on the Working Language and Further Proceedings, KSC-CC-2022-15/F00003, 10 March 2022.

and time limits in due course. Also on 10 March 2022, Thaçi filed two motions seeking joinder to the Krasniqi²¹ and Veseli²² referrals to the SCCC.

12. On 15 March 2022, the SCCC issued the Decision, which invited submissions on a number of issues and set a deadline of 29 March 2022 for the SPO's submissions, and 5 April 2022 for Thaçi's submissions. It also imposed a 20-page limit on the SPO's submissions.

III. SUBMISSIONS

a. The Referral and Joinder Requests are Inadmissible Because Thaçi Has Failed to Exhaust All Remedies (Decision paras 1(a) & (c))

13. The Decision invited submissions on both: 1) whether the Referral is admissible pursuant to, *inter alia*, Constitution Article 113(7), Article 49(3) of the Law, and Rule 20;²³ and, 2) whether, given the ongoing proceedings in the case, Thaçi was required to exhaust further remedies before the Trial Panel, Court of Appeals Panel, and/or Supreme Court Panel, as applicable, before lodging the Referral.²⁴

14. Constitution Article 113(7) and Article 49(3) of the Law both state that applicants are only permitted to refer purported violations of constitutional rights to the SCCC 'after exhaustion of all legal remedies provided by law.' Rule 20(1)(a) expresses the same principle by stating that an applicant may bring a referral to the SCCC if 'all effective remedies provided by law against the alleged violations have been exhausted.'

²¹ Thaçi's Joinder to the Krasniqi Defence Referral to the Constitutional Court Panel, on the Legality of Charging Joint Criminal Enterprise, KSC-CC-2022-13/F00003, 10 March 2022.

²² Thaçi's Joinder to the Constitutional Referral by Kadri Veseli Against "Decision on Appeals Against 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers'", KSC-CC-2022-14/F00003, 10 March 2022.

²³ Decision, KSC-CC-2022-15/F00004, para.1(a).

²⁴ Decision, KSC-CC-2022-15/F00004, para.1(c).

15. The Referral is inadmissible because Thaçi has failed to exhaust all available and effective remedies for the claims that he brings. Leaving aside opportunities Thaçi may have to raise parts of his claims before the trial panel and any Court of Appeals panels, at the very least he will have the opportunity to present any constitutional claims he wishes to the Supreme Court Chamber pursuant to Article 48(8) of the Law and Rule 193 of the Rules of Procedure and Evidence of before the Kosovo Specialist Chambers.

16. Article 48(8) of the Law states:

A request for an extra-ordinary legal remedy under this Article may be filed on the basis of rights available under this law which are protected under the Constitution or the European Convention on Human Rights and Fundamental Freedoms.

17. Article 48(8) of the Law therefore clearly encompasses the ostensible constitutional and ECHR-based claims Thaçi makes in the Referral. Pursuant to Article 48(6) of the Law, Thaçi will be able to make such a request ‘within three (3) months of the final judgment or final ruling against which protection of legality is sought.’ As a result, Thaçi will have at least one other opportunity to seek to resolve the claims in the Referral, and therefore has not exhausted all available remedies. The Referral is therefore inadmissible.

18. The SCCC has previously dismissed referrals as inadmissible on the basis that ‘the Applicant will have a possibility to raise to the competent panels’ the claims raised in the referral.²⁵ At the same time, the SCCC noted ‘that, after the final ruling in the criminal proceedings, if any, is given, the Applicant may re-submit his complaints to this Chamber if he still considers himself a victim of the alleged violation.’²⁶ The same applies here. The Article 48(8) of the Law procedure is available to Thaçi both in theory

²⁵ Decision on the Referral of Driton Lajci Concerning Interview Procedure by the Specialist Prosecutor’s Office, KSC-CC-2019-07/F00013, 13 January 2020, para.24 (‘Lajci Referral’).

²⁶ Lajci Referral, KSC-CC-2019-07/F00013, para.24.

and in practice, and, to the extent his claims are constitutional as he avers, provides a possibility for full redress at the appropriate time.

19. The Kosovo Constitutional Court ('KCC') has similarly drawn a bright-line rule regarding the application of the exhaustion doctrine: 'if the proceedings are ongoing before the regular courts, then the Applicants' Referral is considered premature.'²⁷

20. This requirement to fully exhaust claims in the regular courts (here, the regular courts are the PTJ, Trial Court, Court of Appeals, and Supreme Court) prior to bringing them to the SCCC upholds important structural principles of subsidiarity.²⁸ As the Kosovo Constitutional Court ('KCC') explained in *Malush Sopa, et al. v. Unknown Public Authority* when rejecting a referral where the applicants had failed to follow the 'successive and step by step nature of the exhaustion rule'²⁹:

The purpose of the exhaustion rule is allowing the opportunity to the public authorities, including the regular courts, of preventing or settling alleged violations of the Constitution. The exhaustion rule is operatively intertwined with the subsidiary character of the constitutional justice procedural frame work.

The principle of subsidiarity requires that the Applicants exhaust all procedural possibilities in the regular proceedings, either administrative or judicial, in order to prevent the violation of the constitution or, if any, to remedy such violation of a fundamental right. Thus, Applicants are liable to have their case declared inadmissible by the Constitutional Court, when failing to avail themselves of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings.³⁰

21. Were the SCCC to step-in and adjudicate disputes over-early, it would not only warp the proper order of proceedings, but would also infringe on the powers of the

²⁷ KCC, Case no. KI102/16, Resolution on Inadmissibility, 2 March 2017, para.39; *see also* KCC, Case No. KI 07/13, Resolution on Inadmissibility, 5 July 2013, para.25; KCC, Case No. KI 113/12, Resolution on Inadmissibility, 25 January 2013, para.32; KCC, Case No. KI 94/17, Resolution on Inadmissibility, 27 April 2018, paras 38-39; KCC, Case No. KI 226/19, Resolution on Inadmissibility, 24 September 2020, paras 47-49.

²⁸ *See* KCC, Resolution on Inadmissibility, Case No. KI136/19, 17 May 2021, paras 94-95 (the exhaustion requirement is 'an important aspect of the subsidiary character of the constitutional justice machinery').

²⁹ KCC, Case No. KI 08/11, Resolution on Inadmissibility, 24 April 2012, para.48.

³⁰ KCC, Case No. KI 08/11, Resolution on Inadmissibility, 24 April 2012, paras 46-47 (internal citations omitted); *see also* KCC, Case No. KI 113/12, Resolution on Inadmissibility, 25 January 2013, para.34.

regular courts, which are ‘independent in exercise of their judicial power’ and have a ‘constitutional duty and prerogative to construe questions of fact and questions of law pertinent to the cases before them.’³¹

22. The Referral should therefore be dismissed as inadmissible for failure to exhaust remedies.

23. Thaçi has also filed requests to join in the referrals made by Jakup Krasniqi and Kadri Veseli, although Thaçi does not frame his filings as requests, but instead simply asserts that he is joining those referrals.³² Thaçi’s joinder requests should be dismissed because the referrals he would be joining contain arguments that Thaçi did not present to the PTJ and/or the Court of Appeals Panel, and therefore he has not exhausted those claims in the regular courts. The joinder process cannot be abused to circumvent exhaustion requirements. As the KCC has clearly explained:

Applicants are liable to have their case declared inadmissible by the Constitutional Court, when failing to avail themselves of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. That failure shall be understood as a waiver of the right to object [to] the violation and complain.³³

24. It would be no answer were Thaçi to claim that such 11th-hour joinder to claims of constitutional violation should be permissible because some other party presented these arguments earlier. Such an approach would fly in the face of the need for legal certainty and ordered procedure.³⁴ The joinder requests should therefore also be dismissed for failing to meet the exhaustion requirement.

³¹ KCC, Case No. KI 113/12, Resolution on Inadmissibility, 25 January 2013, para.33.

³² See Thaçi’s Joinder to the Krasniqi Defence Referral to the Constitutional Court Panel, on the Legality of Charging Joint Criminal Enterprise, KSC-CC-2022-13/F00003, 10 March 2022, para.5 (‘the Defence hereby joins the Krasniqi Referral’); Thaçi’s Joinder to the Constitutional Referral by Kadri Veseli Against “Decision on Appeals Against ‘Decision on Motions Challenging the Jurisdiction of the Specialist Chambers’”, KSC-CC-2022-14/F00003, 10 March 2022, para.4 (‘the Defence hereby joins the Veseli Referral’).

³³ KCC, Case No. KI 08/11, Resolution on Inadmissibility, 24 April 2012, para.47.

³⁴ See KCC, Case No. KI 226/19, Resolution on Inadmissibility, 24 September 2020, para.44.

b. The Referral is Manifestly Ill-Founded Because Constitution Article 31(2) and ECHR Article 6(1) Claims are Premature (Decision paras 1(a) & (b))

25. The Decision queries: ‘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?’³⁵ The Decision also invited submissions on the admissibility of the Referral pursuant to, *inter alia*, Rule 14.³⁶ Rule 14(f) states that a claim ‘shall be inadmissible and summarily dismissed’ if ‘upon a prima facie review, the Panel considers ... that nothing in the referral gives rise to the appearance of an incompatibility with the Constitution or a violation of a constitutional right.’

26. Thaçi relies on Constitution Article 31(2) and ECHR Article 6(1) for all of his claims in the Referral. However, the jurisprudence of the SCCC, the KCC, and the ECtHR makes clear that the fair trial rights contained in those provisions must be reviewed holistically, and thus after the conclusion of the proceedings. As a result, it is premature for Thaçi to claim to be a victim of a violation of Constitution Article 31(2) or ECHR Article 6(1). The Referral should therefore be dismissed because it fails, *prima facie*, to give rise to the appearance of a violation of a constitutional right.

27. The SCCC has previously ruled a referral inadmissible on this very basis. In the *Lajci* Referral, this Court was considering claimed violations of, *inter alia*, Constitution Article 31(2) and ECHR Article 6(1), and held:

The Chamber reiterates that, as far as criminal matters are concerned, the primary purpose of Article 31 of the Constitution and Article 6 of the Convention is to ensure that an accused receives, as a whole, a fair trial by a court competent to determine a criminal charge. ... In the present case, the Referral concerns an early stage in the criminal proceedings ... The Referral

³⁵ Decision, KSC-CC-2022-15/F00004, para.1(b).

³⁶ Decision, KSC-CC-2022-15/F00004, para.1(a).

therefore does not relate to a trial before a court within the meaning of Article 31 of the Constitution or Article 6 of the Convention.³⁷

28. This Court then concluded by observing: ‘Besides, the Chamber notes that, after the final ruling in the criminal proceedings, if any, is given, the Applicant may re-submit his complaints to this Chamber if he still considers himself a victim of the alleged violations.’³⁸ The same is true here.

29. The KCC has also held, with regard to fair trial rights, that the relevant question is ‘whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial.’³⁹ Likewise, ‘the ECtHR case law establishes that the fairness of a proceeding is assessed based on the proceeding as a whole.’⁴⁰ As the KCC has observed:

The ECtHR established that the requirement of ‘*fairness*’ as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR covers the proceedings as a whole, and the question of whether a person has had a ‘fair’ trial is looked at [by way of] cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one stage may be put right at a later stage.⁴¹

30. Moreover, as a logical corollary to the fact that fair trial rights are to be reviewed holistically at the conclusion of proceedings, in the event of an acquittal or

³⁷ Lajci Referral, KSC-CC-2019-07/F00013, paras 21-22 (internal citations omitted).

³⁸ Lajci Referral, KSC-CC-2019-07/F00013, para.12.

³⁹ KCC, Case No. KI 08/19, Resolution on Inadmissibility, 5 January 2021, para.4; KCC, Case No. KI 222/19, Resolution on Inadmissibility, 16 April 2020, para.33; *see also* KCC, Case No. KI 144/20, Resolution on Inadmissibility, 5 January 2021, para.19 (‘The Constitutional Court can only consider whether ... the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial’), KCC, Case No. KI 28/19, Resolution on Inadmissibility, 3 January 2020, para.34 (‘The Court notes that the case law of the ECtHR states the fairness of a proceeding is assessed looking at the proceeding as a whole. ... [T]he Court’s duty under the Constitution and the ECHR is to establish whether the proceedings as a whole were fair’); KCC, Case No. KI 81/18, Resolution on Inadmissibility, 12 December 2019, para.55; KCC, Case No. KI 34/18, Resolution on Inadmissibility, 11 June 2018, para.49; KCC, Case No. KI 62/17, Resolution on Inadmissibility, 11 June 2018, para.44.

⁴⁰ KI 131/19 Resolution on Inadmissibility, 21 April 2020, para.39.

⁴¹ KCC, Case No. KI 144/18, Resolution on Inadmissibility, 5 January 2021, para.46 (emphasis in original).

a discontinued prosecution, an individual will not have claim to be a victim of a violation of fair trial rights provisions.⁴²

31. Because the proceedings in the case against Thaçi are ongoing, it is premature to assess whether there has been a violation of any Constitution Article 31(2) or ECHR Article 6(1) fair trial rights. Thaçi has therefore failed to present a *prima facie* claim of a constitutional violation, and the Referral should be dismissed.⁴³

c. The Referral Fails, *Prima Facie*, to Indicate a Violation of a Constitutional Right (Decision paras 1(a) & (e))

32. The Decision queries: ‘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?’⁴⁴ The Decision also invited submissions regarding Rule 14.⁴⁵ Rule 14(f) states that a claim ‘shall be inadmissible and summarily dismissed’ if ‘upon a *prima facie* review, the Panel considers ... that nothing in the referral gives rise to the appearance of an incompatibility with the Constitution or a violation of a constitutional right.’ Thaçi’s arguments fail to give rise to an appearance of a violation of Article 31(2) of the Constitution or Article 6(1) of the ECHR, and should therefore be dismissed pursuant to Rule 14(f).

⁴² ECtHR, *Lenev v. Bulgaria*, 41452/07, Judgment, Court (Fourth Section), 4 December 2012, para.158 (‘According to the Court’s and the former Commission’s settled case-law, a person may not claim to be a victim of a breach of his or her right to a fair trial that allegedly took place in the course of proceedings in which he or she was acquitted or which were discontinued.’).

⁴³ See KCC, Case No. KI 19/13, Resolution on Inadmissibility, 12 March 2013, para.55 (‘[T]he Court notes that, for a *prima facie* case on meeting of requirements for admissibility of the Referral, the Applicant must show that the proceedings in [the regular courts], viewed in their entirety, have not been conducted in such a way that the Applicant has had a fair trial or other violations of the constitutional rights might have been committed by the regular courts during trial.’); see also KCC, Case No. KI 97/13, Resolution on Inadmissibility, 20 December 2013, para.31.

⁴⁴ Decision, KSC-CC-2022-15/F00004, para.1(e).

⁴⁵ Decision, KSC-CC-2022-15/F00004, para.1(a).

**i. Thaçi's Jurisdiction and Panel Composition Arguments Fail
*Prima Facie***

33. Thaçi's first and second arguments, concerning the jurisdiction of the KSC and the assignment of the Court of Appeals Panel, respectively, fail *prima facie* because they raise issues that are not within the purview of the SCCC. Thaçi's first argument is based on a claim that the Indictment strays beyond the jurisdiction of the KSC based on a theory of an insufficient connection to the Council of Europe Report.⁴⁶ Thaçi's second argument is based on a claim that the Court of Appeals Panel was assigned in contravention of Articles 30 and 33 of the Law.⁴⁷ These are both claims that either the Court of Appeals Panel, or the President, incorrectly interpreted the law, matters the determination of which are consigned to the regular courts.

34. The jurisprudence of the SCCC and KCC makes glaringly clear that interpretation of the law is exclusively within the purview of the regular courts, except for rare exceptions not applicable here. 'The Court has repeatedly stated that, as a general rule, the allegations concerning the manner of administration of facts, [and] erroneous interpretation and application of the provisions of substantive or procedural law, allegedly committed by the regular courts, relate to the scope of legality and as such, are not within the jurisdiction of the Constitutional Court, and therefore, in principle, they cannot be reviewed by the Court.'⁴⁸

35. Deviation from this rule is allowed only where an error is so egregious that it rises to the level of 'flagrantly and manifestly arbitrary'.⁴⁹ Under this standard, mere disagreement of the SCCC with the regular courts' conclusions regarding the

⁴⁶ Referral, KSC-CC-2022-15/F00001, paras 26-50.

⁴⁷ Referral, KSC-CC-2022-15/F00001, paras 45-50.

⁴⁸ KCC, Case No. KI 146/20, Resolution on Inadmissibility, 25 June 2021, paras 37-39 (internal citations omitted); *see also* KCC, Case No. KI 144/18, Resolution on Inadmissibility, 5 January 2021, para.63; KCC, Case No. KI 08/19, Resolution on Inadmissibility, 5 January 2021, para.41.

⁴⁹ Public Redacted Version of Decision on the Referral of [REDACTED] Further to a Decision of the Single Judge, KSC-CC-2020-08/F00020, 20 April 2020 ('Decision on Referral from Single Judge'), para.36.

interpretation of a law would not be sufficient to prompt intervention. Instead, the SCCC would have to hold that the regular courts' reasoning was not only entirely arbitrary, but 'flagrantly and manifestly' so. It is patently apparent that the Court of Appeals' and the President's thoroughly reasoned and logical decisions do not even begin to approach this standard.⁵⁰ Moreover, Thaçi himself does not allege in the Referral that either of these purported errors rise to this level.⁵¹ Because Thaçi merely disputes whether the regular courts correctly interpreted the law, the 'referral is manifestly ill-founded with respect to a violation of any of his constitutional or human rights, and consequently is inadmissible.'⁵² Significantly, Thaçi's argument on subject matter jurisdiction is framed primarily around an interpretation of certain articles of the Law,⁵³ and - save for a strained attempt to connect it to Article 162 of the Constitution - does not even raise a *prima facie* case of a constitutional or rights violation of any type.

36. The SCCC has been clear that as a result of its limited role bounded by the terms of Article 49 of the Law, it is not its function to re-evaluate decisions of law or facts by the regular courts, unless such decisions 'are flagrantly and manifestly arbitrary, in a

⁵⁰ See KCC, Case No. KI 06/17, Resolution on Inadmissibility, 18 December 2017, para.45 (decision of the regular courts not manifestly erroneous or arbitrary where 'the relevant provisions of the law have been applied and the regular courts have provided clear and complete reasons for their decisions').

⁵¹ See KCC, Case No. KI 144/20, Resolution on Inadmissibility, 5 January 2021, paras 41-42.

⁵² KCC, Case No. KI 79/10, Resolution on Inadmissibility, 15 January 2013, para.22; *see also* Case No. KI 114/17, Resolution on Inadmissibility, 18 April 2018, para.45; KCC, Case No. KI 119/20, Resolution on Inadmissibility, 5 January 2021, para.33 (analyzing an allegation of violation of Article 31 and stating: 'the Court reiterates that the complete determination of the factual situation, as well as the interpretation and application of the law are in the full jurisdiction of regular courts'); KCC, Case No. KI 79/10, Resolution on Inadmissibility, 15 January 2013, paras 21-22; KCC, Case No. KI 89/12, Resolution on Inadmissibility, 6 February 2013, paras 30-31; KCC, Case No. KI 19/13, Resolution on Inadmissibility, 12 March 2013, para.52 ('the Constitutional Court considers that the facts of the case do not allow a compelling conclusion on that the grounds of appeal ... meet the test of the European Court. Therefore, there is no need to further consider the matter in the circumstances of the case.').

⁵³ Referral, KSC-CC-2022-15/F00001, paras 26-30, 34.

manner that gives rise in itself to a violation of the fundamental rights and freedoms guaranteed by the Constitution.⁵⁴ More fully, the SCCC has explained:

[T]he 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.

It follows that it is not the Chamber's role to decide on whether the findings of the [regular courts] were correct in terms of fact 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. 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.⁵⁵

37. This Court, in laying out these parameters, cited to the ECtHR case of *Sisojeva and Others v. Latvia*.⁵⁶ In *Sisojeva*, the applicant made a claim that a law had been incorrectly applied in their case, but the Grand Chamber reminded the applicant that

⁵⁴ Decision on Referral from Single Judge, para.36; *see also* ECtHR, *Navalnyy v. Russia*, 101/15, Judgment, Court (Third Section), 17 October 2017, para.57 ('according to its general approach, the Court does not question the interpretation and application of national law by national courts unless there has been a flagrant non-observance or arbitrariness in the application of that law'); ECtHR, *Poletan and Azirovik v. The Former Yugoslav Republic of Macedonia*, 26711/07, 32786/10 and 34278/10, Judgment, Court (First Section), 12 May 2016, para.109 ('it is not the Court's function to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention and unless that domestic assessment is manifestly arbitrary'); KCC, Case No. KI 37/18, Resolution on Inadmissibility, 11 June 2018, para.43 ('The Court further recalls that it is beyond its jurisdiction to assess the quality of the conclusions of the regular courts, unless it is manifestly arbitrary.');

KCC, Case No. KI 154/17 and KI 05/18, Resolution on Inadmissibility, 13 August 2019, para.64; KCC, Case No. KI 144/18, Resolution on Inadmissibility, 5 January 2021, para.52; KCC, Case No. KI 146/20, Resolution on Inadmissibility, 25 June 2021, para.41 (emphasis in original); *see also* KCC, Case No. KI 06/17, Resolution on Inadmissibility, 18 December 2017, paras 37-46.

⁵⁵ Decision on Referral from Single Judge, paras. 35-36 (internal citations omitted); *see also* Lajci Referral, para.18; KCC, Case No. KI 146/20, Resolution on Inadmissibility, 25 June 2021, paras 37-39 (internal citations omitted); KCC, Case No. KI 144/18, Resolution on Inadmissibility, 5 January 2021, para.63; KCC, Case No. KI 08/19, Resolution on Inadmissibility, 5 January 2021, para.41.

⁵⁶ Decision on Referral from Single Judge, fn.43.

‘the Court cannot question the assessment of the domestic authorities unless there is clear evidence of arbitrariness.’⁵⁷

38. The KCC has recognized that is not a constitutional court’s ‘duty to deal with errors of facts or erroneous interpretation and erroneous applications of law allegedly committed by a regular court, unless and insofar such errors may violate the rights and freedoms protected by the Constitution and/or the ECHR.’⁵⁸ The KCC and ECtHR have also stated explicitly that the principle applies equally to domestic incorporation of international law:

[I]t is not the task of the Constitutional Court to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court’s role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention and the Constitution.⁵⁹

39. As a result, ‘the interpretation of the law are matters only for the regular courts, the assessments and conclusions of which in this regard are binding on the [constitutional] Court.’⁶⁰ The constitutional court ‘may not itself assess the law which has led a regular court to adopt one decision rather than another,’⁶¹ nor can ‘abstract

⁵⁷ ECtHR, *Sisojeva and Others v. Latvia (striking out)*, 60654/00, Judgment, Grand Chamber, 15 January 2007, para.89; see also KCC Case No. KI 72/18, Resolution on Inadmissibility, 14 December 2018, para.40 (it is the ‘the role of regular courts is to interpret and apply the relevant rules of procedural and substantive law’); KCC, Case No. KI 37/18, Resolution on Inadmissibility, 11 June 2018, para.41; KCC, Case No. KI 85/12, Resolution on Inadmissibility, 22 January 2013, para.28; KCC, Case No. KI 55/09, Judgment, 6 April 2011, para.21 (‘It is not the task of the Constitutional Court to assess the legality and accurateness of decisions made by competent judicial institutions, unless there is clear evidence that such decisions have been rendered in an obviously unfair and inaccurate manner.’).

⁵⁸ KCC, Case No. KI 144/20, Resolution on Inadmissibility, 5 January 2021, para.38.

⁵⁹ KCC, Case No. KI 11/21, Resolution on Inadmissibility, 31 May 2021, para.81; see also ECtHR, *Korbely v. Hungary*, 9174/02, Judgment, Grand Chamber, 19 September 2008, para.72; ECtHR, *Waite and Kennedy v. Germany*, 26083/94, Judgment, Court, 18 February 1999, para.54; ECtHR, *Neulinger and Shuruk v. Switzerland*, 41615/07, Judgment, Grand Chamber, 6 July 2010, para.100; ECtHR, *Selahattin Demirtaş v. Turkey*, 14305/17, Judgment, Grand Chamber, 22 December 2020, para.249.

⁶⁰ KCC, Case No. KI 144/18, Resolution on Inadmissibility, 5 January 2021, para.52; see also KCC, Case No. KI 96/17, Resolution on Inadmissibility, 30 April 2018, para.59.

⁶¹ KCC, Case No. KI 06/17, Resolution on Inadmissibility, 18 December 2017, paras 37-38; see also KCC, Case No. KI 140/18, Resolution on Inadmissibility, 16 January 2020, para.71.

assessments ... be made as to why a regular court has decided in one way rather than in another.⁶² Respect for this division of functions between the regular courts on the one hand, and the SCCC on the other, is therefore no mere technicality, but a central feature of the judicial structure established by the Constitution and the Law, and a necessary corollary of the subsidiary nature of the constitutional court whereby it does not act as a further court of appeal.⁶³ This patent incompatibility of two of the Referral's claims with the functions of the SCCC requires that they be dismissed as inadmissible.⁶⁴

40. In addition, Thaçi's argument concerning the composition of the Court of Appeals Panel fails *prima facie* for a second reason: Thaçi fails to show, or even allege, any harm from this purported error. Thaçi makes no allegation that the appointed panel did not carry out their duties appropriately in any way. As such, this claim may

⁶² KCC, Case No. KI 222/19, Resolution on Inadmissibility, 16 April 2020, para.32.

⁶³ See KI 28/19 Resolution on Inadmissibility, 3 January 2020, para.36 (the constitutional court 'may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "fourth instance", which would result in exceeding the limits set by its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law.');

KI 06/17 Resolution on Inadmissibility, 18 December 2017, paras 37-38; KI 97/13 Resolution on Inadmissibility, 20 December 2013, para.33; see also KI 114/17 Resolution on Inadmissibility, 18 April 2018, para.33.

⁶⁴ See KCC, Case No. KI 144/20, Resolution on Inadmissibility, 5 January 2021, para.30; KCC, Case No. KI 79/10, Resolution on Inadmissibility, 15 January 2013, paras 21-22; KCC, Case No. KI 89/12, Resolution on Inadmissibility, 6 February 2013, para.30; KCC, Case No. KI 19/13, Resolution on Inadmissibility, 12 March 2013, para.52 ('the Constitutional Court considers that the facts of the case do not allow a compelling conclusion on that the grounds of appeal ... meet the test of the European Court. Therefore, there is no need to further consider the matter in the circumstances of the case.');

KCC, Case No. KI 96/17, Resolution on Inadmissibility, 30 April 2018, para.60; KCC, Case No. KI 08/19, Resolution on Inadmissibility, 5 January 2021, para.46; KCC, Case No. KI 154/17 and KI 05/18, Resolution on Inadmissibility, 13 August 2019, paras 76-77 (dismissing legal claims in a referral as 'manifestly ill-founded on constitutional basis');

KCC, Case No. KI 144/20, Resolution on Inadmissibility, 5 January 2021, para.42; see also ECtHR, *Gratzinger and Gratzingerova v. the Czech Republic*, 39794/98, Decision, Grand Chamber, 10 July 2002, paras 85-86; ECtHR, *Mentzen v. Latvia*, 71074/01, Decision, Court (Fourth Section), 7 December 2004, page 31 ('the Latvian authorities have not overstepped the margin of appreciation they are afforded in this sphere. It follows that the application must be rejected as manifestly ill-founded').

also be dismissed as inadmissible for failing to allege a constitutional violation because any error is harmless (*de minimis non curat praetor*).⁶⁵

ii. **Thaçi's Reasoned Opinion Argument Fails *Prima Facie***

41. Thaçi's third argument is that the Decision on Appeal was insufficiently reasoned in violation of ECHR Article 6(1).⁶⁶ This argument fails to substantiate a constitutional violation *prima facie* because the Decision on Appeal is self-evidently sufficiently reasoned under the pertinent standard. As Thaçi recognizes,⁶⁷ ECHR Article 6(1) does not require that a decision contain a detailed answer to every argument.⁶⁸ The applicable standard is one of 'sufficiently reasoned', which can be satisfied even in situations, contrary to the present one, where more reasoning might have been desirable.⁶⁹ As the KCC has explained, the obligation to provide sufficient reasoning

cannot be understood as a requirement for a detailed answer to each argument. The extent [of] the obligation to give reasons may vary depending on the nature of the decision and must be determined in the light of the circumstances of the case. The essential arguments of the Applicant are to be addressed and the reasons given must be based on the applicable law.⁷⁰

⁶⁵ See ECtHR, *Kiril Zlatkov Nikolov v. France*, 70474/11, Court (Fifth Section), 10 November 2016, para.63 (alleged failure to follow procedures in purported violation of ECHR Article 6(1) fair trial rights declared inadmissible where 'there is no indication that in the circumstances of the case, [the alleged error] had any significant impact on the exercise of his rights in the context of the criminal proceedings against him, or even, more broadly, on his personal situation'); see also ECtHR, *C.P. v. The United Kingdom*, 300/11, Decision, Court (First Section), paras 47, 52 (declaring application inadmissible where harm was speculative); cf. ECtHR, *Shefer v. Russia*, 45175/04, Court (First Section), Decision, 13 March 2012, para.18 (referral inadmissible pursuant to ECtHR article reflecting *de minimis non curat praetor* because a claimed violation of a right must reach 'a minimum level of severity', a standard that 'purely technical and insignificant outside a formalistic framework' claims do not reach).

⁶⁶ Referral, KSC-CC-2022-15/F00001, paras 56-64.

⁶⁷ Referral, KSC-CC-2022-15/F00001, paras. 53, 63.

⁶⁸ KI 131/19 Resolution on Inadmissibility, 21 April 2020, para.41.

⁶⁹ See KCC, Case No. KI 154/17 and KI 05/18, Resolution on Inadmissibility, 13 August 2019, para.85; ECtHR, *Merabishvili v. Georgia*, 72508/13, Judgment, Grand Chamber, 28 November 2017, para.227.

⁷⁰ KI 131/19 Resolution on Inadmissibility, 21 April 2020, para.41; see also KCC, Case No. KI 143/16, Resolution on Inadmissibility, 8 June 2018, para.56.

42. In keeping with this, the obligation to reason opinions cannot

be understood as an obligation to state all the details in the judgment and to answer all the questions raised and arguments presented. The Court also notes that, according to the position taken by the European Commission on Human Rights, *the final decisions of the appellate courts do not have to contain exhaustive reasoning, but the one which the court deems relevant and well-founded.*⁷¹

43. Thus, when a court addresses the ‘essential allegations’ in an argument, a claim of insufficient reasoning rising to the level of a constitutional harm will be dismissed as ‘manifestly ill-founded on a constitutional basis.’⁷²

44. Thaçi claims that the Appeals Decision did not adequately address his arguments concerning the Council of Europe Report’s connection to the jurisdiction of the KSC, including as regards Constitution Article 103(7).⁷³ In the Decision on Appeal, the Court of Appeals Panel summarized the relevant portion of Thaçi’s appeal brief,⁷⁴ including the argument that ‘the Pre-Trial Judge erred in circumventing the Kosovo Constitutional Court Judgement’ and that ‘stretching the jurisdiction of the Specialist Chambers as was done in the [PTJ’s decision] would lead the Specialist Chambers to lose their specialised nature and to become an extraordinary court prohibited by Article 103(7) of the Constitution of Kosovo.’⁷⁵ The Court of Appeals Panel then addressed the essential allegations at paragraphs 66-73 of the Decision on Appeal, including consideration of how the crimes within the jurisdiction of the KSC must relate to the Council of Europe Report, the relevance of Kosovo Constitution Article 103(7), and the KCC’s decision on that matter.

⁷¹ KCC, Case No. KI 34/18, Resolution on Inadmissibility, 11 June 2018, paras 73-74 (internal citations omitted, emphasis in original).

⁷² KCC, Case No. KI 154/17 and KI 05/18, Resolution on Inadmissibility, 13 August 2019, paras 85, 89.

⁷³ Referral, KSC-CC-2022-15/F00001, paras 56-64.

⁷⁴ Decision on Appeal, KSC-BC-2020-06/IA009/F00030, paras 60-61.

⁷⁵ Decision on Appeal, KSC-BC-2020-06/IA009/F00030, para.60.

45. It is therefore evident *prima facie* that the Court of Appeals panel met (and exceeded) the relevant standard in issuing the Decision on Appeal, and thus Thaçi's argument that it did not do so should be dismissed pursuant to Rule 14(f).

d. Thaçi's Appeals Panel Composition Claim and Joinder Requests are Time-Barred (Decision Paras 1(a) & (d))

46. The Decision queries: '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?'⁷⁶ The Decision also invited submissions regarding Rules 14 and 20.⁷⁷ Rule 14(d) states that a referral shall be inadmissible and summarily dismissed where 'the referral is submitted out of time.' Rule 20(1)(b) mandates that a referral be filed 'within two (2) months from the date of the notification of the final ruling concerning the alleged violation.'⁷⁸

47. One of Thaçi's claims in the Referral is that the Court of Appeals Panel that issued the Decision on Appeal was selected in violation of certain procedural rules, and that this in turn constituted a constitutional violation.⁷⁹ However, this claim is time-barred because it was not made within two months of 'notification of the final ruling concerning the alleged violation.'⁸⁰ The final ruling on this issue was notified 20 September 2021, when the KSC President issued her decision denying Thaçi's application for reconsideration, and denying Thaçi's motion for disqualification of Judge Gatti.⁸¹ Indeed, Thaçi has also made clear that in his view this was the final

⁷⁶ Decision, KSC-CC-2022-15/F00004, para.1(d).

⁷⁷ Decision, KSC-CC-2022-15/F00004, para.1(a).

⁷⁸ Rule 20(2) provides information on the assessment of the start and end of the two month period.

⁷⁹ Referral, KSC-CC-2022-15/F00001, paras 45-50.

⁸⁰ Rule 20(2).

⁸¹ Decision on Applications for Reconsideration and Disqualification of a Judge from a Court of Appeals Panel KSC-BC-2020-06/F00476, 17 September 2021 (filed on Friday, 17 September 2021 but notified on Monday, 20 September 2021).

decision on this issue, by writing in the Referral: ‘Both the request for recusal and request for disqualification were denied. As such avenues for remedies for this error were exhausted before the KSC’.⁸² Thaçi filed his Referral on 28 February 2022—well over the permitted two months from 20 September 2021. This claim is thus clearly time-barred.

48. Thaçi’s requests for joinder to Veseli and Krasniqi’s referrals are also time-barred. The joinder requests are effectively Thaçi’s attempts to raise the arguments contained in Veseli’s and Krasniqi’s referrals on his own behalf. As such, they should similarly be subject to Rule 20(1)(b)’s two-month time limit. However, the joinder requests were filed on 10 March 2022, over a week after the two-month period had passed following issuance of the Decision on Appeal. The joinder requests are therefore also time-barred.

49. The SPO notes that its arguments on the applicable time limits proceed as an alternative to the SPO’s position that Thaçi has failed to exhaust all remedies, which themselves provide independent basis for dismissal.

IV. RELIEF REQUESTED

50. For the foregoing reasons, the SPO respectfully requests that the Referral be dismissed.



Jack Smith

Specialist Prosecutor

⁸² Referral, KSC-CC-2022-15/F00001, para.66.

Tuesday, 29 March 2022

At The Hague, the Netherlands.

EXPLANATORY NOTE:

1. The cover page was modified to accord with Constitutional Court standards.