

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 Counsel for Hashim Thaçi

Date: 8 April 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**

**Thaçi Written Submissions Pursuant to the Constitutional Court Panel's 'Decision
on Further Submissions'**

Applicant

Hashim Thaçi

Specialist Prosecutor

Jack Smith

I. INTRODUCTION

1. In accordance with the Specialist Chamber of the Constitutional Court's 'Decision on Further Submissions',¹ the Defence for Mr Hashim Thaçi ("Defence") files its written submissions in response.²

II. PRELIMINARY ISSUE

2. The Constitutional Panel's adjudication of the Referral violates the constitutional right sought to be protected by it: the right to an independent and impartial tribunal established by law. Contrary to its own practice,³ and without any basis in the Law⁴ or Rules,⁵ the Constitutional Panel has prejudiced its decision by directing specific and impermissibly leading questions to the SPO, before the SPO has responded to the Referral on the merits. These questions not only identify lines of arguments to challenge the Referral and its admissibility, but also undermine the presumption of innocence, are premised on inaccurate assumptions by the Constitutional Panel, and reveal a bias on its part against the Referral's admissibility.

3. The prejudice arises in a number of ways. Firstly, the Decision limits the SPO's response to the questions themselves, prejudicially dismissing the remainder of the

¹ KSC-CC-2022-15/F00004, Decision on Further Submissions, 15 March 2022 ("Decision"), pp. 5, 7.

² KSC-CC-2022-15/F00005/COR, Corrected version of 'Prosecution Response to Decision on Further Submissions in Relation to Thaçi Referral (KSC-CC-2022-15-F00004)', 29 March 2022 ("SPO Response"). For a detailed history, see 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, 28 February 2022 ("Referral"), paras. 9-15.

³ See, e.g., KCC, KSC-CC-2019-05/F00003, Notice Regarding Replying Submissions on interim measures in the case concerning the referral of Mahir Hasani, 18 January 2019; KCC, KSC-CC-2019-05/F00003, Notice Regarding Replying Submissions in the case concerning the referral of Mahir Hasani, 18 November 2019; KCC, KSC-CC-2019-07/F00006, Notice Regarding Replying Submissions in the case concerning the referral of Driton Lajçi, 18 November 2019.

⁴ Law No. 05/L-053 on the Specialist Chambers and the Specialist Prosecutor's Office ("Law").

⁵ KSC-BD-03/Rev3/2020, Rules of Procedure for the Specialist Chamber of the Constitutional Court, 2 June 2020 ("Rules").

Referral as already decided and not requiring an SPO response.⁶ Article 35(2)(i) of the Law places a “responsibility” on the SPO to respond to “any applications at the Specialist Chamber of the Constitutional Court.” This “responsibility” also forms part of Kosovo’s constitutional review procedure.⁷

4. Secondly, the questions contain inaccurate assumptions that prejudice the Constitutional Panel’s decision. Question 1(b) effectively instructs the SPO that the question of “conviction” is relevant, and should be invoked to challenge the Referral’s admissibility. This is incompatible with the presumption of innocence, which is required to underpin these proceedings. Question 1(c) reveals the Constitutional Panel’s inclination to dismiss the Referral as inadmissible given the ongoing nature of the criminal proceedings, and Mr Thaçi’s purported right to raise his complaints “before the trial panel, and, subsequently, and as the case may be, before the Court of Appeals panel.”⁸ Characterising the proceedings against Mr Thaçi relevant to the Referral as “still ongoing” is prejudicial, given that the exhaustion of remedies requirement will be examined against this pre-determined conclusion. While the larger criminal case against Mr Thaçi continues, the relevant phase pertaining to Mr Thaçi’s preliminary challenge regarding lack of jurisdiction has concluded. The Referral relates to this, standalone, phase. Moreover, the identification of the extraordinary legal remedies in Question 1(c) solicits specific legal arguments from the SPO to challenge the Referral’s admissibility.

⁶ *Ibid*, para. 10: “[...] the Chamber notes that it will disregard any unsolicited submissions.”

⁷ Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (“Law on the Constitutional Court”), Article 22. While Article 33(8) explicitly excludes the application of the Law on the Constitutional Court with respect to the procedure concerning the assignment and composition of panels, Article 22 is, at the very least, instructive in ensuring that proceedings for the review and adjudication of constitutional referrals meet the minimum constitutional requirements of due process, guaranteed by Article 31(2) of the Constitution and Article 6(1) of the ECHR.

⁸ Decision, p. 6, para. 1(c) of the operative clause.

5. Thirdly, the Decision distorts the scope of the Referral by its leading questions on the identification of the actual ruling challenged with respect to the assignment and composition of the Appeals Panel.⁹ The Referral is directed solely against the Appeals Panel Decision,¹⁰ and submits that the composition of the bench can be challenged after the respective bench has issued its decision.¹¹ Despite this, the Constitutional Panel impermissibly coaches the SPO to challenge the admissibility of this particular ground on the basis that it was directed against the wrong ruling and is, as a result, untimely. The prejudice identified above is then exacerbated by the SPO embracing all arguments offered to it by the Decision.

6. Rule 15(2) does not provide a legal basis for these specific and leading questions, as alleged.¹² Quite the opposite; Rule 15(2) relates to the Constitutional Panel's ability to hear **additional** submissions from the parties after they have filed their first, and mandatory, round of written submissions. In light of the supplementary nature of the submissions filed pursuant to Rule 15(2), the Constitutional Panel is authorized by Rule 15(3) to set a time limit for their filing. Neither Rule 15(2) nor Rule 15(3) empowers the Constitutional Panel to designate part of a referral as not worthy of a response by directing the SPO not to address it. This SPO response is mandatory under Article 35(2)(i) of the Law.

7. Mr Thaçi accordingly records his position that the Decision prejudices the present proceedings and, in addition to infringing Mr Thaçi's constitutional right to an impartial and independent tribunal established by law, may serve to deprive Mr Thaçi of his constitutional right to a legal remedy before the Constitutional Panel.¹³

⁹ Decision, p. 6, para. 1(d) of the operative clause.

¹⁰ KSC-BC-2020-06/IA009/F00030, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021 ("Appeals Panel Decision").

¹¹ *Ibid*, paras. 23 – 25.

¹² Decision, paras. 9-10.

¹³ Rule 20 of the Rules, Article 49(3) of the Law and Article 113(7) of the Constitution, as guaranteed by Article 32 of the Constitution.

III. SUBMISSIONS

a. The Referral and Joinder Requests are Admissible, and all Remedies have been exhausted (Decision paras 1(a) & (c))

8. Before filing a Constitutional referral, applicants must first exhaust the legal remedies provided by law.¹⁴

9. Article 48 of the Law is headed “Extra-ordinary Legal Remedy”. It provides an avenue for extraordinary legal remedies, including the re-opening of criminal proceedings terminated by a final judgment, extraordinary mitigation of punishment, and the protection of legality.

10. The SPO’s position is that Mr Thaçi failed to exhaust all available and effective remedies because “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).”¹⁵ The SPO then asserts that “under Article 48(6) of the Law, [Mr] Thaçi will be able to make such a request within three (3) months of the final judgment or final ruling against which a protection of legality is sought”.¹⁶

11. Firstly, Article 48(6) of the Law provides that, during criminal proceedings which have not been completed in final form, the extraordinary legal remedy of *protection of legality* can be sought only against final decisions ordering or extending **detention on remand**. This extraordinary legal remedy is, therefore, not applicable to the Appeals Panel Decision challenged by the Referral.

¹⁴ Law, Article 49(3); Constitution, Article 113(7).

¹⁵ SPO Response, para. 15.

¹⁶ SPO Response, para. 17.

12. The other extraordinary legal remedies – foreseen under Articles 48(2) and (5) of the Law – are, likewise, inapplicable to the Appeals Panel Decision, as they relate to: (i) reopening of criminal proceedings; and (ii) extraordinary request for mitigation of punishment, *i.e.* extraordinary remedies available only at the end of the criminal proceedings. As such, even theoretically, there was no extraordinary legal remedy under Article 48 of the Law that was available to Mr Thaçi to exhaust prior to challenging the Appeals Panel Decision before the Constitutional Panel. Consequently, even according to the provisions of the Law cited by the SPO Response, the Referral was filed in accordance with Rule 20(1)(a) of the Rules and Article 113(7) of the Constitution, *i.e.* after Mr Thaçi exhausted all effective legal remedies against the challenged ruling.

13. The SPO Response also places undue importance on the references to the Constitution and the ECHR in Article 48(8) of the Law, in suggesting that extraordinary legal remedies foreseen under this provision are the most appropriate remedies to challenge violations of constitutional rights in criminal proceedings. In fact, these references in Article 48(8) offer no added value, given that Article 22(2) of the Constitution mandates the direct application of the ECHR in Kosovo, and Article 53 requires all Kosovo courts to comply with ECHR jurisprudence when interpreting human rights and freedoms guaranteed by the Constitution.

14. Importantly, the KCC has relied on ECtHR practice and case law to find that, in exhausting legal remedies, individuals are not required to “use discretionary or extraordinary remedies, for example requesting a court to review its decision or requesting the reopening of proceedings” or “exhaust legal remedies that are not directly at their disposal, but had to rely on the exercise of discretion”.¹⁷ The SPO’s

¹⁷ See, *e.g.*, KCC, KI 102/16 Resolution on Inadmissibility of the Constitutional Court, 2 March 2017, para. 38.

insistence that the extraordinary legal remedies under Article 48 must first be exhausted is therefore directly at odds with the KCC and ECtHR's unambiguous approach.

15. Unsurprisingly, therefore, the extensive jurisprudence cited by the SPO does not support its position. In *Lajçi*,¹⁸ the applicant challenged the SPO's interview procedure on the basis that, *inter alia*, the SPO summons was not sufficiently specific.¹⁹ The Constitutional Panel in *Lajçi* was petitioned in the absence of any judicial rulings, much less a final court ruling, concerning the alleged violation of the applicant's constitutional rights, distinguishing this case from the present on its facts.

16. Relevantly, the Constitutional Panel in *Lajçi* held it would have found the referral admissible had the applicant challenged a final ruling concerning a decision issued by a Pre-Trial Judge under Article 39 of the Law.²⁰ Article 39(1) of the Law explicitly includes the competence of the Pre-Trial Judge to rule on preliminary motions. This demonstrates that a final ruling in criminal proceedings challenged before the Constitutional Panel may properly include a final ruling of the Pre-Trial Judge on preliminary motions, undermining the SPO's argument that the Referral is inadmissible on this basis.

17. Putting this misleading citation of *Lajçi* to one side, the extensive list of authorities cited in the SPO Response does not include the most directly relevant decision: the Constitutional Panel's decision in *Hasani*. In this case, a referral was filed challenging the constitutionality of an SPO order compelling a suspect to produce

¹⁸ Response, para. 18, citing Decision on the Referral of Driton Lajçi Concerning Interview Procedure by the Specialist Prosecutor's Office, KSC-CC-2019-07/F00013, 13 January 2020 ("Constitutional Panel Lajçi Decision"), para. 24.

¹⁹ Constitutional Panel Lajçi Decision, paras. 8-9.

²⁰ *Ibid*, para. 24.

certain documents and information at his interview.²¹ The SPO then withdrew the challenged order after the Constitutional Panel granted injunctive relief suspending it.²² The SPO's withdrawal of the impugned order was therefore done knowing the likelihood that the Constitutional Panel would declare the referral admissible and find that the SPO had violated Mr Hasani's rights.

18. Relevantly for the present case, although the Constitutional Panel was not ultimately required to assess the admissibility of the referral in *Hasani*, had the SPO been confident in its position that the challenged order was inadmissible because the criminal proceedings were not concluded by a final judgment, it is unlikely that the SPO would have withdrawn it. Moreover, the SPO's failure to cite this directly relevant jurisprudence reveals its understanding that the withdrawal of the challenged order in *Hasani* defeats its position that only final judgments by which criminal proceedings are concluded can be challenged before the Constitutional Panel, and only after the exhaustion of extraordinary legal remedies under Article 48.

19. More serious than the SPO's selective citations, are its misleading ones. The SPO asserts that the KCC has drawn a "bright-line rule" regarding the application of the exhaustion doctrine, that "if the proceedings are ongoing before the regular courts, then the Applicant's Referral is considered premature."²³ The SPO cites to six KCC cases, which apparently provide support for this rule. None of them do.

20. The SPO first cites to KI 102/16, ignoring that in this case, the KCC held that the referral was inadmissible as the applicant had concurrently exercised an extraordinary legal remedy, which was **still pending** before the Supreme Court.²⁴

²¹ KCC, KSC-CC-2019-05/F00012, Decision on the Referral of Mahir Hasani Concerning Interview Procedure by the Specialist Prosecutor's Office, 20 February 2019, paras. 41 – 44 and para. 50.

²² *Ibid*, paras. 51 – 52.

²³ SPO Response, para. 19.

²⁴ KCC, KI 102/16 Resolution on Inadmissibility of the Constitutional Court, 2 March 2017, para. 37.

Incredibly, one paragraph prior to that cited by the SPO in support of the supposed bright-line rule, the KCC addressed the limits of the exhaustion principle, finding that:

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... based on the case law of the European Court on Human Rights, the **individuals need not to use discretionary or extraordinary remedies, for example requesting a court to review its decision or requesting the reopening of proceedings** (see: *Çinar v. Turkey* and *Prystavka v. Ukraine*). The individuals are also **not obliged to exhaust legal remedies that are not directly at their disposal, but had to rely on the exercise of discretion by the mediator** (see: for example *Tanase v. Moldova*, [GC] paragraph 122).

21. KI 102/16 therefore undermines entirely the SPO's position that extraordinary legal remedies must be exhausted prior to petitioning the Constitutional Panel.²⁶

22. The SPO then relies on KI 113/12, without mentioning that this referral was declared inadmissible because the Supreme Court had remanded the case for retrial following the approval of the applicant's request for protection of legality. KI 94/17 and KI 226/19 are relied on, despite the fact that these referrals were declared inadmissible for having been filed while the challenged orders/rulings were pending on appeal.²⁷ The SPO then cites to KI 136/19, notwithstanding that the applicant in this case had filed the referral before the Basic Court in Prishtina, Department for Administrative Matters had ruled on his claim and, certainly, before filing an appeal against this judgment.²⁸ In KI 08/11, the Constitutional Court dismissed the referral as inadmissible because the applicants' grievances for violation of their constitutional rights were filed simultaneously to twelve/nineteen different institutions,²⁹ meaning

²⁵ *Ibid*, para. 38.

²⁶ *Ibid*, paras. 39, 41-43.

²⁷ KCC, KI 94/17 Resolution on Inadmissibility of the Constitutional Court, 27 April 2018, paras. 38-39; KCC, KI 226/19 Resolution on Inadmissibility of the Constitutional Court, 24 September 2020, paras. 45-46.

²⁸ KCC, KI 136/19 Resolution on Inadmissibility of the Constitutional Court, 17 May 2021, para. 91.

²⁹ KCC, KI 08/11 Resolution on Inadmissibility of the Constitutional Court, 24 April 2012, para. 40.

that the applicants petitioned the Constitutional Court even before seeking redress before regular courts.³⁰

b. The Referral is Well Founded because Article 31(2) of the Constitution and Article 6(1) of the ECHR Claims are Timely (Decision paras. 1(a) & (b))

23. The SPO submits that Mr Thaçi cannot yet claim to be a victim of a violation of Constitution Article 31(2) or ECHR Article 6(1) because such an assessment can only be made “after the conclusion of the proceedings”.³¹ In other words, “because the proceedings against [Mr.] Thaçi are ongoing, it is premature to assess whether there has been a violation” of his rights as claimed.³² This position cannot be sustained, for the reasons set out below.

24. Firstly, the SPO Response offers no specific legal authority to support its broad and unfounded claim that “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.”³³ As explained above, the reliance on the *Lajçi* case for this argument only confirms the absence of Constitutional Panel case law to support the SPO’s position on this particular issue.³⁴

25. Rather, the case law of the KCC and the ECtHR³⁵ establishes that Article 31(2) of the Constitution and Article 6 of the ECHR undoubtedly apply to preliminary proceedings. As the ECtHR reiterated in *Dvorski v. Croatia*, “even if the primary

³⁰ *Ibid*, paras. 47 and 48.

³¹ SPO Response, para. 26.

³² SPO Response, para. 31.

³³ SPO Response, para. 26.

³⁴ *Ibid*, para. 27.

³⁵ ECHR, Guide on Article 6 of the Convention: Right to a fair trial (criminal limb), 31 December 2021 (“ECHR Article 6 Guide”), para. 48: “As regards the pre-trial stage (inquiry, investigation), the Court considers criminal proceedings as a whole, including the pre-trial stage of the proceedings (*Dvorski v. Croatia*, 76).”

purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that the Article has no application to pre-trial proceedings.”³⁶ The Court has consistently held that any person subject to a criminal charge must enjoy Article 6 protections at every stage of the proceedings. This protection “may thus become relevant even before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the provisions of Article 6.”³⁷

26. In its landmark case KI 122/17, the KCC recognized that “ECtHR has applied Article 6 of the ECHR to [...] preliminary proceedings when it considered that the injunctive relief measures were decisive for the civil rights of the Applicant.”³⁸ The KCC noted that decisions in preliminary proceedings may be challenged under Article 6 of the ECHR provided what is at stake is a civil right and that the preliminary proceedings effectively determine the respective civil right,³⁹ citing the following passage from *Micallef v. Malta*:⁴⁰

The exclusion of interim measures from the ambit of Article 6 has so far been justified by the fact that they do not in principle determine civil rights and obligations. **However, in circumstances where many Contracting States face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge’s decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases.** It follows that, frequently interim and main proceedings decide the same civil rights or obligations and have the same resulting long-lasting or permanent effects.

³⁶ ECtHR, *Dvorski v. Croatia*, Application no. 25703/11, Grand Chamber, Judgment, 20 October 2015, para. 76. See also *Imbrioscia v. Switzerland*, Application no. 13972/88, Court (Chamber), Judgment, 24 November 1993, para. 37.

³⁷ ECHR Article 6 Guide, para. 435, and the cases cited therein.

³⁸ KCC, KI 122/17 Judgment of the Constitutional Court, 30 April 2018, para. 127, and the ECtHR jurisprudence cited therein.

³⁹ *Ibid*, para. 130 – 131.

⁴⁰ *Ibid*, para. 128.

27. As such, preliminary proceedings that cause the prolongation of, or affect the duration of, the proceedings may infringe a right protected under Article 6 of the ECHR.⁴¹ Similarly, unnecessary proceedings, *i.e.* proceedings for which a court has no subject-matter jurisdiction, likewise affect the constitutional rights protected under ECHR Article 6 and Constitution Article 31(2). Indeed, the right to raise preliminary motions at the outset of the criminal proceedings and, as importantly, the right to appeal the decisions of the Pre-Trial Judge on these preliminary motions,⁴² reflect this principle. Forcing an accused to petition the Constitutional Court on a jurisdictional question only at the end of the criminal proceedings, as the SPO proposes, would be a punishment in and of itself, given that the accused would have to go through criminal proceedings for which the respective court did not have jurisdiction in the first place. The violation of the accused's rights would be further exacerbated if the accused is detained on remand during the trial. The KCC has consistently applied the *Micallef v. Malta* standard.⁴³

28. The SPO Response's reliance on case KI 08/19 is equally puzzling, given that the criminal proceedings were actually concluded with a guilty verdict and the KCC was petitioned after the exhaustion of the extraordinary legal remedy of *protection of legality*.⁴⁴ Further, in this case, the KCC declared the referral inadmissible because the applicant simply repeated the arguments of law and fact raised before the regular courts.⁴⁵ For the same reasons, rulings cited in cases KI 222/19, KI 144/20, KI 28/19, KI 81/18 and KI 34/18⁴⁶ are entirely irrelevant to the Referral. The SPO also wrongly

⁴¹ ECtHR, *Micallef v. Malta*, Application No. 17056/06, Grand Chamber, Judgment, 15 October 2009, para. 79 (emphasis added).

⁴² Rule 97, Rules of Procedure and Evidence before the Kosovo Specialist Chambers.

⁴³ See, e.g., KCC, KI 81/19 Resolution on Inadmissibility of the Constitutional Court, 5 December 2019; KCC, KI 150/16 Judgment of the Constitutional Court, 31 December 2018.

⁴⁴ KCC, KI 08/19 Resolution on Inadmissibility of the Constitutional Court, 5 January 2021, paras. 9-19.

⁴⁵ *Ibid*, paras. 32 and 41-47.

⁴⁶ SPO Response, fn. 39.

characterizes KI 62/17 as a resolution on inadmissibility. It is a Constitutional Court judgment, finding a violation of applicant's constitutional rights.⁴⁷

c. The Referral is based on a Violation of Constitutional Rights (Decision paras 1(a) and (e))

i. Jurisdiction and Panel Composition

29. In order to allege that the violations raised by the Referral fail *prima facie*, the SPO re-characterises them as general disputes over errors of facts and law, and then spends pages arguing that the errors do not rise to the level of 'flagrantly and manifestly arbitrary', and as such should be dismissed.⁴⁸

30. The errors raised by the Referral are not disputes over errors of fact and law, and therefore do not need to rise to the 'flagrantly and manifestly arbitrary' threshold explored in such detail by the SPO. Rather, the Referral properly identified that through: (i) the impermissible expansion of the KSC's subject matter jurisdiction; and (ii) the altering of the composition of an Appeals Panel in a manner that removes institutional safeguards to ensure the independence and impartiality of KSC Judges, Mr Thaçi's right to an independent and impartial tribunal established by law was violated.⁴⁹ These are not disputes over fact and law. The SPO's extensive submissions are irrelevant.

ii. Reasoned Opinion

⁴⁷ KCC, KI 62/17 Judgment of the Constitutional Court, 11 June 2018.

⁴⁸ SPO Response, paras. 33-40.

⁴⁹ Referral, paras. 26-50.

31. Neither the SPO nor the Defence disagree on the relevant governing principles on reasoned opinions, which the SPO again repeats at length.⁵⁰ However, the parties remain divided on whether these were complied with in the Appeals Panel Decision.

32. Importantly, the SPO asserts that the Court of Appeals Panel “addressed the essential allegations in paragraphs 66-73 of the Decision”.⁵¹ Nowhere in these paragraphs, or elsewhere, did the Court of Appeals Panel consider or adjudicate Ground 1 of Mr Thaçi’s appeal that the Pre-Trial Judge’s approach to jurisdiction circumvented the findings of the KCC, and rendered the KSC an extraordinary court, prohibited under Article 107(3) of the Constitution.⁵² This was not failure to give a detailed answer to a particular submission; the Court of Appeals Panel effectively sidestepped a Ground of Appeal, on a central issue concerning the Pre-Trial Judge’s approach rendering the KSC a court of general jurisdiction. A central issue raised on appeal was never addressed. Simply repeating uncontested jurisprudence that a court is not required to produce exhaustive reasoning on every aspect of a party’s submissions does not assist.

**d. The Referral’s Composition Claim and Joinders were timely filed
(Decision paras 1(a) & (d))**

33. Picking up on the suggestion in Question 1(d), the SPO claims that the Referral is directed against the decisions of the President for the assignment and the change of the Appeals Panel and/or disqualification of the replacement judge. On this basis, the SPO asserts that the Referral is out of time.⁵³ In doing so, the SPO has mischaracterised the Referral as an attempt to impermissibly review the prior decision(s), rather than a

⁵⁰ SPO Response, paras 41-43.

⁵¹ SPO Response, para. 44.

⁵² Referral, paras. 56-62.

⁵³ SPO Response, paras. 46 and 47.

challenge to the institutional integrity of the Court in issuing the Appeals Panel Decision on 23 December 2021.⁵⁴

34. Nothing in the ECtHR jurisprudence cited above, or in the SPO Response, suggests that the challenge in the Referral cannot be raised after the Court of Appeals Panel, which was constituted unlawfully and/or unconstitutionally, rendered its ruling. The SPO's assertion that this ground of the Referral is inadmissible as it was issued out of time should be summarily dismissed.

35. As regards the two joinder applications to the referrals to the Constitutional Court made by Mr Kadri Veseli,⁵⁵ and Mr Jakup Krasniqi,⁵⁶ there is nothing in the Law or Rules which limits the right of the Constitutional Panel to join referrals under Rule 15 of the Rules.

[Word count: 4,214 words]

Respectfully submitted,



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Friday, 8 April 2022

At Tampa, United States

⁵⁴ Referral, paras. 49-50.

⁵⁵ KCC, KSC-CC-2022-14/F00003, 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'", 10 March 2022.

⁵⁶ KCC, KSC-CC-2022-13/F00003, Thaçi's Joinder to the Krasniqi Defence Referral to the Constitutional Court Panel on the Legality of Charging Joint Criminal Enterprise, 10 March 2022.