



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

Case number: KSC-CC-2022-18

Before: The Specialist Chamber of the Constitutional Court

Judge Vidar Stensland, Presiding

Judge Roumen Nenkov

Judge Romina Incutti

Registrar: Fidelma Donlon

Date: 22 August 2022

Language: English

File name: Referral to the Constitutional Court Panel concerning the violation of Mr Shala's fundamental rights guaranteed by Articles 30 and 31 of the Kosovo Constitution and Article 6 of the European Convention on Human Rights

Classification: Public

**Public Redacted Version of the Decision on the Referral of Pjetër Shala
to the Constitutional Court Panel Concerning Fundamental
Rights Guaranteed by Articles 30 and 31 of the Kosovo Constitution
and Article 6 of the European Convention on Human Rights**

Applicant

Pjetër Shala

Specialist Prosecutor

Jack Smith

The Specialist Chamber of the Constitutional Court

Composed of

Vidar Stensland, Presiding Judge

Roumen Nenkov, Judge

Romina Incutti, Judge

Having deliberated remotely delivers the following Decision

I. PROCEDURE

1. On 19 July 2022, Mr Pjetër Shala ("Applicant") lodged with the Specialist Chamber of the Constitutional Court ("Chamber")¹ a referral under Articles 30, 31 and 113(7) of the Constitution of the Republic of Kosovo ("Constitution") and Article 49(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office.² The Applicant was represented by Mr Jean-Louis Gilissen, Mr Hédi Aouini and Ms Leto Cariolou.

2. On 22 July 2022, the President of the Specialist Chambers ("SC") assigned the Chamber to rule on the Referral.³

3. On 28 July 2022, the Chamber issued a decision wherein it, *inter alia*, indicated that it may, in due course, request additional submissions from the Applicant and the Specialist Prosecutor's Office ("SPO").⁴ However, the Panel considers the Referral

¹ With regard to the assignment of the Constitutional Court Panel under Article 33(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law").

² KSC-CC-2022-18, F00001, Referral to the Constitutional Court Panel concerning the violation of Mr Shala's fundamental rights guaranteed by Articles 30 and 31 of the Kosovo Constitution and Article 6 of the European Convention on Human Rights, confidential, 19 July 2022 ("Referral").

³ KSC-CC-2022-18, F00002, Decision to assign judges to a constitutional court panel, 22 July 2022, confidential.

⁴ KSC-CC-2022-18, F00003, Decision on the working language and further proceedings, 28 July 2022, confidential, p. 3.

sufficiently comprehensive and the Panel decided that it does not require additional submissions in this respect.

II. THE FACTS

4. On 12 June 2020, the pre-trial judge confirmed an indictment against the Applicant, charging him with war crimes allegedly committed between at least 17 May 1999 and 5 June 1999 in Kosovo and areas of northern Albania.⁵

5. [REDACTED].⁶

6. On 2 November 2021, the single judge, further to the SPO's request, authorised the disclosure of certain documents [REDACTED] to the Applicant.⁷

7. On 11 March 2021, the Applicant requested access to further confidential and *ex parte* material [REDACTED], which, the Applicant contended, closely relates to his own case before the SC.⁸

8. On 13 April 2022, the single judge [REDACTED] found that the Applicant had clearly identified the material he sought access to.⁹ However, the single judge rejected the Applicant's request on the basis that, *inter alia*, the SPO had fulfilled its disclosure obligations in accordance with the SC's legal framework and noted that the general content and subject matter of the remaining three documents [REDACTED], were revealed to the Applicant.¹⁰

9. On 18 May 2022, the single judge rejected the Applicant's request for reconsideration of the Decision on request for access and denied his request for

⁵ KSC-BC-2020-04, F00007/RED, Public redacted version of the decision on the confirmation of the indictment against Pjetër Shala, public, 12 June 2020 (the public redacted version was filed on 6 May 2021).

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED], para. 12.

¹⁰ [REDACTED], paras 13-19.

certification to appeal this decision.¹¹

III. ALLEGED VIOLATIONS

10. The Applicant complained before the Chamber that the rights afforded to him pursuant to Articles 30 and 31 of the Constitution, as well as Article 6 of the European Convention on Human Rights (“Convention”) were violated when the single judge: (i) denied him access to exculpatory material [REDACTED]; (ii) did not allow the Applicant to make submissions on his right to access this material pursuant to Rule 82 of the SC’s Rules of Procedure and Evidence; and (iii) failed to conduct the proceedings [REDACTED] in a public manner, including his related requests for access and appeal.¹²

IV. JURISDICTION

11. The Chamber recalls that the Applicant filed the Referral under Article 113(7) of the Constitution and raised complaints in relation to the proceedings conducted against him before the SC. The Referral therefore relates to the SC and the SPO, as required by Article 162(3) of the Constitution and Articles 3(1) and 49(2) of the Law. Accordingly, the Chamber has jurisdiction to rule on the Referral.

V. ADMISSIBILITY

A. CONSTITUTIONAL RIGHTS AT ISSUE

12. As noted above, the Applicant’s complaints relate to Articles 30 and 31 of the Constitution, as well as Article 6 of the Convention. The Chamber recalls that, by virtue of Article 22(2) and (3) of the Constitution, the guarantees set forth in the

¹¹ [REDACTED].

¹² See generally the Referral.

Convention apply at the constitutional level.¹³ The Kosovo Constitutional Court has reiterated that the rights and freedoms guaranteed by international instruments in Article 22 of the Constitution “have the status of norms of constitutional rank and are an integral part of the Constitution, in the same way as all other provisions contained in the Constitution”.¹⁴ Accordingly, the Chamber finds that the Referral is to be considered under Article 33(1) of the Constitution and Article 6 of the Convention.¹⁵

13. However, before the Chamber can examine the Referral on the merits, it must first ascertain whether it is admissible.¹⁶ The Chamber thus turns to the assessment of certain admissibility requirements provided for in the Constitution, the Law and the Rules of Procedure for the Specialist Chamber of the Constitutional Court (“SCCC Rules”), which arise in the present proceedings.

B. WHETHER THE APPLICANT’S COMPLAINTS ARE PREMATURE

14. The Chamber recalls that, pursuant to Article 113(7) of the Constitution and Article 49(3) of the Law, individuals are authorised to refer to the Chamber alleged violations of their individual rights and freedoms guaranteed by the Constitution. Rule 14(f) of the SCCC Rules provides that a referral shall be inadmissible if nothing in the referral gives rise to the appearance of a violation of a constitutional right.

¹³ See KSC-CC-2022-14, F00009, Decision on the referral of Jakup Krasniqi concerning the legality of charging joint criminal enterprise and the referral of Kadri Veseli concerning decision of the appeals panel on challenges to the jurisdiction of the Specialist Chambers, public, 13 June 2022 (“*Decision on referral of Krasniqi and Veseli*”), para. 34. See also KSC-CC-2020-08, F00020/RED, Public redacted version of decision on the referral of [REDACTED] further to a decision of the Single Judge, public, 20 April 2020 (“*Decision concerning a decision of the single judge*”), para. 61; KSC-CC-2019-07, F00013, Decision on the referral of Driton Lajci concerning interview procedure by the Specialist Prosecutor’s Office, public, 13 January 2020 (“*Decision on the referral of Driton Lajci*”), para. 14.

¹⁴ Kosovo, Constitutional Court, *Constitutional review of judgments [A.A.U.ZH. no. 20/2019 of 30 October 2019; and A.A.U.ZH. no. 21/2019, of 5 November 2019] of the Supreme Court of the Republic of Kosovo*, KI 207/19, Judgment, 10 December 2020 (5 January 2021), para. 111.

¹⁵ *Decision on referral of Krasniqi and Veseli*, para. 35; *Decision on the referral of Driton Lajci*, para. 15.

¹⁶ See *Decision on referral of Krasniqi and Veseli*, para. 36, see also *Decision concerning a decision of the single judge*, para. 37.

15. The Chambers observes that the criminal proceedings against the Applicant are pending and the charges at issue are yet to be decided. Accordingly, the Chamber must first determine whether the Applicant may claim to be a victim of the alleged violations.¹⁷

1. Whether the Applicant may Claim to be a Victim

(a) The Submissions

16. While the Applicant did not address whether he may claim to be a victim, he did contend that he has exhausted all available remedies as a result of the denial by the single judge of his request for reconsideration or certification to appeal the Decision on request for access.¹⁸

(b) The Chamber's Assessment

17. The Chamber observes that the criminal proceedings against the Applicant are ongoing and that the SPO has yet to present its witnesses and the Applicant its defence before a trial panel. Similarly, a Court of Appeals panel may still be seised with an appeal in this case and a Supreme Court panel may also be called to pronounce itself on this case. Insofar as the applicant complains of the fairness of pending proceedings, the outcome of such proceedings may be relevant in determining whether the Applicant may claim to be a victim of the alleged violations of the rights set forth in Articles 30 and 31 of the Constitution and Article 6 of the Convention.¹⁹

18. The Chamber recalls that, for example, in *Sakhnovskiy v. Russia* [GC] and *Oleksy v. Poland*, the European Court for Human Rights held that an individual could not

¹⁷ See *Decision on referral of Krasniqi and Veseli*, para. 38.

¹⁸ Referral, para. 16.

¹⁹ See KSC-CC-2022-15, F00010, 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, 13 June 2022, public ("*Decision on referral of Thaçi*"), para. 60.

claim to be a victim of a violation of his or her right to a fair trial under Article 6(1) of the Convention where those proceedings had been discontinued or where the individual had been acquitted.²⁰ The limited exceptions to this principle include complaints pertaining to the length of the proceedings in question and access to a court.²¹

19. Indeed, it falls in the first place to the criminal chambers to assess whether there is any merit to the raised procedural violation and whether this has to be remedied in the course of the ensuing proceedings.²² This approach reflects the general principle according to which compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident.²³

2. Conclusion

20. The Chamber therefore finds that, at this stage of the proceedings, the Applicant's referral is premature.²⁴ Accordingly, the Referral must be declared inadmissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 14(f) of the SCCC Rules.

21. While the Chamber finds that the Referral must be dismissed for the aforementioned reasons, it recalls that the SC's legal framework allows the Applicant to raise alleged violations of the rights afforded to him pursuant to Articles 30 and 31 of the Constitution and Article 6 of the Convention, at various future stages of the proceedings, including an appeal against the trial judgment pursuant to Article 46 of

²⁰ ECtHR, *Saknovskiy v. Russia* [GC], no. 21272/03, 2 November 2010, para. 77; *Oleksy v. Poland*, no. 1379/06, 16 June 2009. See also *Decision on referral of Thaçi*, para. 60.

²¹ ECtHR, *Osmanov and Husseinov v. Bulgaria* (dec.), nos 54178/00 and 59901/00, 4 September 2003.

²² Cf. ECtHR, *Mehmet Zeki Çelebi v. Turkey*, no. 27582/07, 28 January 2020, para. 51.

²³ ECtHR, *Ibrahim and others v. the United Kingdom* [GC], no 50541/08 and others, 13 September 2016, paras 250-251.

²⁴ Cf. *Decision on referral of Thaçi*, para. 65; *Decision on referral of Krasniqi and Veseli*, para. 55.

the Law. The Chamber notes in this respect that pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 20(1)(a) of the SCCC Rules, an individual may only make a referral to the Chamber after exhaustion of all effective remedies provided for by law against the alleged violation.

C. REQUEST FOR A HEARING

22. The Applicant requested the Chamber to schedule an oral hearing.²⁵

23. The Chamber recalls that, after the expiry of the time limits for the filing of written submissions, it shall decide on a referral on the basis of the written submissions, unless a hearing is in the interests of the proper administration of justice.²⁶ The Chamber considers that it can decide on the Referral without a hearing. Accordingly, the Applicant's request for an oral hearing is dismissed.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

1. *Declares* the Referral of Mr Pjetër Shala inadmissible; and
2. *Dismisses* the Referral in its entirety.



Vidar Stensland
Presiding Judge

Done in English on Monday, 22 August 2022

At The Hague, the Netherlands

²⁵ Referral, para. 41.

²⁶ See Rule 15(4) of the SCCC Rules.