



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

Case number: KSC-CC-2023-21

Before: The Specialist Chamber of the Constitutional Court

Judge Vidar Stensland, Presiding

Judge Roumen Nenkov

Judge Romina Incutti

Registrar: Fidelma Donlon

Date: 29 August 2023

Language: English

File name: Referral by Pjetër Shala to the Constitutional Court Panel Concerning the Violation of Mr Shala's Fundamental Rights Guaranteed by Articles 31, 32, and 54 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights

Classification: Public

**Decision on the Referral of Pjetër Shala to the Constitutional Court Panel
Concerning the Violation of Mr Shala's Fundamental Rights Guaranteed by
Articles 31, 32, and 54 of the Kosovo Constitution and Articles 6 and 13 of the
European Convention on Human Rights**

Applicant

Pjetër Shala

Acting Deputy Specialist Prosecutor

Ward Ferdinandusse

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

A. REFERRAL

1. On 11 July 2023, Mr Pjetër Shala (“Applicant”) lodged with the Specialist Chamber of the Constitutional Court (“Chamber”)¹ a referral, dated 10 July 2023 (“Referral”),² under Articles 31, 32, 54 and 113(7) of the Constitution of the Republic of Kosovo (“Constitution”), Article 49(3) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”), as well as Rules 4(c) and 20 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (“SCCC Rules”). The Applicant was represented by Mr Jean-Louis Gilissen, Mr Hédi Aouini and Ms Leto Cariolou.

2. In the Referral, the Applicant complained about violations of his fundamental rights in relation to the criminal proceedings against him, taking place before the Specialist Chambers (“SC”). In particular, the Applicant claimed that the Trial Panel’s finding that statements given by him to the Belgian Federal Judicial Police in 2016 (“2016 Belgian Interview”) were not inadmissible as evidence, and the Trial Panel’s subsequent refusal to reconsider its finding, violated his right to a fair trial and right

¹ KSC-CC-2023-21, F00003, Decision to Assign Judges to a Constitutional Court Panel, 14 July 2023, confidential, reclassified as public on 26 July 2023.

² KSC-CC-2023-21, F00001, Referral to the Constitutional Court Panel Concerning the Violation of Mr Shala’s Fundamental Rights Guaranteed by Articles 31, 32 and 54 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, 11 July 2023, confidential, reclassified as public on 20 July 2023 (“Referral”).

to an effective remedy under Articles 31, 32 and 54 of the Constitution, and Articles 6 and 13 of the European Convention on Human Rights (“Convention”).³

3. The Applicant also requested the Chamber to temporarily suspend the criminal proceedings pending against him pursuant to Article 116(2) of the Constitution.⁴

B. WRITTEN SUBMISSIONS, EXAMINATION OF THE REFERRAL, AND HEARING

4. The Chamber considered that the Referral was sufficiently comprehensive and that no additional written submissions were necessary under Rule 15(2)-(3) of the SCCC Rules.

5. The Chamber thus turns to the examination of the Referral based on the Referral and the documents referred to therein. This decision refers to the facts of the case and the submissions of the Applicant insofar as relevant for the Chamber’s assessment of the Referral.

6. As regards the Applicant’s request to schedule an oral hearing,⁵ the Chamber considers that it can decide on the Referral without a hearing required. Accordingly, the Applicant’s request for an oral hearing is dismissed pursuant to Rule 15(4) of the SCCC Rules.

II. THE FACTS

A. TRIAL PROCEEDINGS

7. The Applicant is currently being tried before a Basic Court Panel of the SC for war crimes allegedly committed between at least 17 May 1999 and 5 June 1999 in Kosovo and areas of northern Albania.⁶

³ Referral, paras 1-3, 25-37, 39.

⁴ Referral, para. 41.

⁵ KSC-CC-2023-21, F00001, para. 38.

⁶ KSC-BC-2020-04, F00007/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment Against Pjetër Shala, 12 June 2020, public (the public redacted version was filed on 6 May 2021), paras 93, 101, 106, 111, 140(a).

8. On 20 September 2022, the Applicant submitted a request before the Trial Panel seeking, among others, the exclusion from the case file of the statements given by him on the occasion of the 2016 Belgian Interview, prior to his arrest and trial before the SC.⁷

9. On 6 December 2022, the Trial Panel issued a decision whereby it decided, *inter alia*, that the Applicant's statements given in the context of the 2016 Belgian Interview were not inadmissible as evidence in the ongoing criminal proceedings against him before the SC ("Decision on Prior Statements").⁸

10. On 24 January 2023, the Trial Panel granted the Applicant leave to appeal the Decision on Prior Statements on certain issues, including as to whether the Trial Panel erred in fact and law by considering that the Applicant was sufficiently informed of the nature and cause of the suspicion against him as well as of his right to have access to a lawyer on the occasion of the 2016 Belgian Interview.⁹

B. INTERLOCUTORY APPEAL

11. On 6 February 2023, the Applicant appealed the Decision on Prior Statements.¹⁰

12. On 5 May 2023, the Court of Appeals Panel issued its decision on the Applicant's appeal against the Decision on Prior Statements, which it granted in part by finding that the Trial Panel had erred by considering that the Applicant had been sufficiently informed of his right to have access to a lawyer on the occasion of the 2016 Belgian

⁷ KSC- BC-2020-04, F00281/RED, Public redacted version of Motion to exclude evidence from the case file to be transmitted to the Trial Panel, 20 September 2022, public (the public redacted version was filed on 18 January 2023), with Annexes 1-3, confidential.

⁸ KSC-BC-2020-04, F00364/COR/RED, Public redacted version of Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2022, public (the public redacted and corrected version was filed on 26 January 2023) ("Decision on prior statements").

⁹ KSC-BC-2020-04, F00401, Decision on request for leave to appeal the Decision concerning prior statements given by Pjetër Shala, 24 January 2023, public, paras 6(iii), 43, 73(a).

¹⁰ KSC-BC-2020-04, IA006/F0002, Defence appeal against the "Decision concerning prior statements given by Pjetër Shala", 6 February 2023, public.

Interview (“Appeals Panel Decision”).¹¹ But, since it found no indicia of unreliability or possible damage to the integrity of the proceedings if the 2016 Belgian Interview is admitted as evidence, the Court of Appeals Panel upheld the Trial Panel’s decision to consider the 2016 Belgian Interview as not inadmissible pursuant to Rule 138(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).¹²

C. REQUEST FOR RECONSIDERATION

13. On 18 May 2023, the Applicant filed a request seeking reconsideration by the Trial Panel of the Decision on Prior Statements in light of the findings made in the Appeals Panel Decision, as well as a request for an expedited ruling in that respect (“Request for Reconsideration”).¹³

14. On 23 May 2023, the Trial Panel rendered a decision rejecting the Applicant’s request for an expedited ruling on the Request for Reconsideration.¹⁴

15. On 6 June 2023, in an oral ruling, the Trial Panel also rejected the Applicant’s Request for Reconsideration.¹⁵

III. ALLEGED VIOLATIONS

16. The Applicant complained before the Chamber that the rights afforded to him pursuant to Articles 31, 32 and 54 of the Constitution, and Articles 6 and 13 of the Convention were violated when the Trial Panel: (i) decided that statements given by him during the 2016 Belgian Interview are not inadmissible as evidence and can be

¹¹ KSC-BC-2020-04, IA006/F00007, Decision on Shala’s appeal against Decision concerning prior statements, 5 May 2023, public, (“Appeals panel decision”), paras 72-78, 109.

¹² Appeals panel decision, paras 79-81, 109.

¹³ KSC-BC-2020-04, F00515, Defence request for reconsideration of the “Decision concerning prior statements given by Pjetër Shala”, 18 May 2023, public.

¹⁴ KSC-BC-2020-04, F00520, Decision on the Defence request for an expedited ruling on its request for reconsideration of the “Decision concerning prior statements given by Pjetër Shala”, 23 May 2023, public.

¹⁵ KSC-BC-2020-04, Transcript of Hearing, 6 June 2023, public, p. 1938, line 14 to p. 1939, line 25.

used for the purpose of its judgment as well as of detention review; and (ii) rejected the Request for Reconsideration filed by him following the Appeals Panel Decision.¹⁶

IV. JURISDICTION

17. The Chamber observes 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 Specialist Prosecutor's Office, as required by Article 162(3) of the Constitution and Articles 3(1) and 49(2) of the Law. Thus, the Chamber has jurisdiction to rule on the Referral.

V. ADMISSIBILITY

A. CONSTITUTIONAL RIGHTS AT ISSUE

18. As noted above, the Applicant's complaints relate to Articles 31, 32 and 54 of the Constitution, and Articles 6 and 13 of the Convention. The Chamber recalls that, by virtue of Article 22(2) of the Constitution, the guarantees set forth in the Convention apply at the constitutional level.¹⁷ The Kosovo Constitutional Court has reiterated that the rights and freedoms guaranteed by the international instruments enumerated 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".¹⁸ In view of the foregoing, the Chamber finds that the Referral falls to be considered under Articles 31, 32 and 54 of the Constitution, and Articles 6 and 13 of the Convention.¹⁹

¹⁶ Referral, paras 1-3, 25-37, 39.

¹⁷ See KSC-CC-2022-13, F00010; 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, 13 June 2022, public ("*Decision on the referral of Krasniqi and Veseli*"), para. 34, with further references.

¹⁸ 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.

¹⁹ See, among others, *Decision on the referral of Krasniqi and Veseli*, para. 35.

19. However, before the Chamber may examine the Referral on the merits, it must first determine whether the Referral is admissible.²⁰ This follows from Article 113(1) of the Constitution, pursuant to which the Chamber decides only on matters “referred to [it] in a legal manner by authorised parties”.²¹ Furthermore, Rule 15(1) of the SCCC Rules provides that the Chamber shall decide on “the admissibility and/or the merits of a referral made under Article 49 of the Law”. Accordingly, the Chamber shall first ascertain *ex officio* whether the Referral is admissible or not.²² The Chamber thus turns to the question of admissibility.

B. WHETHER THE APPLICANT’S COMPLAINTS ARE PREMATURE

20. The Chamber recalls that pursuant to Article 113(7) of the Constitution as well as Article 49(3) of the Law, individuals are authorised to refer to the Chamber alleged violations of their individual rights and freedoms guaranteed under the Constitution. This is further set out in Rule 20(1) of the SCCC Rules. In this regard, the Chamber notes that 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.

21. The Chamber observes that the criminal proceedings against the Applicant are pending and that the charges at issue are yet to be decided. Accordingly, the Chamber

²⁰ KSC-CC-2022-15, F00010, Decision on the referral of Hashim Thaçi concerning the right to an independent and impartial tribunal established by law and to a reasoned opinion, 13 June 2022, public (“*Decision on the referral of H. Thaçi concerning jurisdictional challenge*”), para. 42. See also *Decision on the referral of Krasniqi and Veseli*, para. 36.

²¹ KSC-CC-2022-19, F00004/RED, Public redacted version of the decision on the referral of Pjetër Shala concerning fundamental rights guaranteed by Articles 31 and 32 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, 15 December 2022, public (“*Decision on the referral of P. Shala concerning access to court and legal remedy*”), para. 14; *Decision on the referral of H. Thaçi concerning jurisdictional challenge*, para. 42. See also Kosovo, Constitutional Court, *Constitutional review of decision Ae no. 287/18 of the Court of Appeals of 27 May 2019 and decision I.EK. no. 330/2019 of the Basic Court in Prishtina, Department for Commercial Matters, of 1 August 2019*, KI 195/19, Judgment, 5 May 2021 (31 May 2021), paras 68-69; *Constitutional review of decision Pml no. 313/2018 of the Supreme Court of 10 December 2018*, KI 12/19, Resolution on inadmissibility, 10 April 2019 (3 May 2019), paras 30-31.

²² *Decision on the referral of P. Shala concerning access to court and legal remedy*, para. 14; *Decision on the referral of H. Thaçi concerning jurisdictional challenge*, paras 42-43.

must first determine whether the Applicant, at this stage of the criminal proceedings, may claim to be a victim of the alleged violations.²³

1. Whether the Applicant may Claim to be a Victim

(a) The Submissions

22. The Applicant submitted that the Referral is admissible. In particular, he alleged that he has exhausted all the available legal remedies following the Appeals Panel Decision upholding the Trial Panel's Decision on Prior Statements.²⁴ The Applicant also argued that he was a direct victim of the alleged violations of his right to a fair trial and right to an effective remedy under Articles 31, 32 and 54 of the Constitution, and Articles 6 and 13 of the Convention resulting from the Trial Panel's Decision on Prior Statements, and the subsequent dismissal of his Request for Reconsideration.²⁵ Lastly, the Applicant contended that he had submitted the Referral within two months of the Appeals Panel Decision (see paragraph 12 above) and the Trial Panel's dismissal of his Request for Reconsideration (see paragraph 15 above).²⁶

(b) The Chamber's Assessment

23. At the outset, the Chamber pays heed to the fact that the Applicant's complaint refers, in essence, to: (i) an alleged violation of the Applicant's right to a fair trial as a result of the Trial Panel's findings that the statements given by him during the 2016 Belgian Interview are not inadmissible as evidence; and (ii) the alleged absence of an effective remedy in that respect.²⁷ The Chamber further notes that, while Article 31 of

²³ See, among others, KSC-CC-2022-18, F00004/RED, 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, 22 August 2022, public ("*Decision on the referral of P. Shala concerning access to material*"), para. 15; *Decision on the referral of Krasniqi and Veseli*, para. 38.

²⁴ Referral, paras 19-20.

²⁵ Referral, paras 19, 21-22.

²⁶ Referral, para. 19.

²⁷ Referral, paras 26-31, 32-37.

the Constitution and Article 6 of the Convention guarantee the right to a fair hearing, neither lays down rules on the admissibility of evidence as such, which is, in the context of the SC, primarily a matter for regulation by the Law and the Rules and the relevant criminal chambers.²⁸ Specifically, this matter is regulated by Rule 138 of the Rules, and it was assessed as such by both the Trial Panel²⁹ and the Court of Appeals Panel.³⁰

24. It is not, therefore, the role of the Constitutional Court to determine, as a matter of principle, whether particular types of evidence may be admissible. Rather, the question which the Chamber would have to answer is whether the proceedings, as a whole, including the way in which the evidence was obtained, were fair.³¹ In this context, the Chamber recalls that, while the statements given by the Applicant on the occasion of the 2016 Belgian Interview have been found to be available to the Trial Panel for the purposes of its judgment, the panel has not yet made use of them in determining the charges against the Applicant.³² The Chamber nevertheless notes that the Trial Panel has continued to make use of these statements for the purpose of detention review. However, the Panel observes that the Applicant has not raised a complaint under Article 29 of the Constitution and Article 5 of the Convention, neither in this Referral, nor otherwise.

25. Further to the above, the Chamber notes that the criminal proceedings against the Applicant are pending and the charges at issue are yet to be wholly examined and

²⁸ Cf. ECtHR, *Moreira Ferreira v. Portugal (No. 2)* [GC], no. 19867/12, 11 July 2017, para. 83. See also Kosovo, Constitutional Court, *Constitutional review of Judgment Pml. No. 199/2018 of the Supreme Court of the Republic of Kosovo, of 5 December 2018*, KI 63/19 and KI 66/19, Resolution on inadmissibility, 12 April 2021 (26 April 2021), para. 100 (in Albanian) ("*Constitutional review of Judgment Pml. No. 199/2018 of the Supreme Court of the Republic of Kosovo*").

²⁹ Decision on prior statements, paras 19-21, 67-79.

³⁰ Appeals panel decision, paras 70-81.

³¹ ECtHR, *Ayetullah Ay v. Turkey*, nos 29084/07 and 1191/08, 27 October 2020, para. 124; *Constitutional review of Judgment Pml. No. 199/2018 of the Supreme Court of the Republic of Kosovo*, para. 101.

³² Decision on prior statements, paras 80, 114(c). See further KSC-BC-2020-04, F00491/RED, Public redacted version of Decision on the Specialist Prosecutor's motion for admission of documentary evidence, 20 April 2023, public, paras 40-41.

determined by the Trial Panel and, as the case may be, by a Court of Appeals and a Supreme Court panel, in accordance with their respective competence. Insofar as the Applicant complains about the fairness of pending proceedings, the outcome thereof may be relevant in determining whether the Applicant may claim to be a victim of the alleged violation of the rights set forth in Article 31 of the Constitution and Article 6 of the Convention.³³

26. The Chamber recalls the well-established case-law of the European Court of Human Rights (“ECtHR”), such as *Sakhnovskiy v. Russia* [GC] and *Oleksy v. Poland*, among others, in which the ECtHR held that an individual could not claim to be a victim of a violation of his or her right to a fair trial under Article 6 of the Convention where those proceedings had been discontinued or where the individual had been acquitted.³⁴ The limited exceptions to this principle include, for instance, complaints pertaining to the reasonable length of the proceedings and access to court.³⁵

27. 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.³⁶ 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 a single procedural incident, save the case that a specific factor, even one impacting the early stages of the proceedings, may be found, after the determination of the charges and the completion of the proceedings by the criminal chambers, to have been so decisive as to

³³ *Decision on the referral of P. Shala concerning access to material*, para. 17. See also *Decision on the referral of H. Thaçi concerning jurisdictional challenge*, para. 60.

³⁴ ECtHR, *Sakhnovskiy v. Russia* [GC], no. 21272/03, 2 November 2010, para. 77 (“*Sakhnovskiy v. Russia*”); *Oleksy v. Poland*, no. 1379/06, 16 June 2009. See also *Decision on the referral of P. Shala concerning access to material*, para. 18; *Decision on the referral of H. Thaçi concerning jurisdictional challenge*, para. 60.

³⁵ *Sakhnovskiy v. Russia*, para. 77; ECtHR, *Osmanov and Husseinov v. Bulgaria* (dec.), nos 54178/00 and 59901/00, 4 September 2003. See also *Decision on the referral of P. Shala concerning access to material*, para. 18.

³⁶ *Decision on the referral of P. Shala concerning access to material*, para. 19, referring to ECtHR, *Mehmet Zeki Çelebi v. Turkey*, no. 27582/07, 28 January 2020, para. 51.

automatically render the proceedings as a whole unfair.³⁷ In this regard, the Chamber also notes that the case law of the ECtHR referenced by the Applicant, addressing alleged breaches of the right to legal representation under Article 6 of the Convention, concerned the question of whether the proceedings as a whole had been fair after their completion.³⁸

28. It follows that the Applicant, at this stage of the proceedings, cannot claim to be a victim of the alleged violation of his right to fair trial pursuant to Article 31 of the Constitution and Article 6 of the Convention. The same conclusion applies to the alleged violation of Articles 32 and 54 of the Constitution and Article 13 of the Convention, as the right to legal remedy has no independent existence and can only be applied in combination with a purported violation of another right with respect to which an individual has an arguable claim.³⁹

2. Conclusion

29. The Chamber thus finds that, at this stage of the proceedings, the Referral is premature.⁴⁰ Therefore, the Applicant's complaints under Articles 31, 32 and 54 of the Constitution and Articles 6 and 13 of the Convention 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.

30. Lastly, whereas 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 31, 32 and

³⁷ ECtHR, *Ibrahim and others v. the United Kingdom* [GC], no. 50541/08 and others, 13 September 2016, paras 250-251, 254.

³⁸ Referral, para. 27. See also, generally, ECtHR, *Çimen v. Turkey*, no. 19582/02, 3 February 2009; *Panovits v. Cyprus*, no. 4268/04, 11 December 2008.

³⁹ See, for example, ECtHR, *Maurice v. France* [GC], no. 11810/03, 6 October 2005, para. 106; *Zavoloka v. Latvia*, no. 58447/00, 7 July 2009, para. 35(a).

⁴⁰ Cf. *Decision on the referral of H. Thaçi concerning jurisdictional challenge*, para. 65; *Decision on the referral of Krasniqi and Veseli*, para. 55.

54 of the Constitution and Articles 6 and 13 of the Convention at various future stages of the proceedings, including an appeal against the trial judgment pursuant to Article 46 of the Law. The Chamber further 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 having exhausted all the effective remedies provided for by law against the alleged violation.

31. In view of the foregoing, the Applicant's request to order the suspension of the criminal proceedings pending against him must also be 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 Tuesday, 29 August 2023
At The Hague, the Netherlands