

1 Thursday, 7 February 2019

2 The Hague, Netherlands

3 Kosovo Specialist Chambers - Constitutional Court

4 [Ruling]

5 [Open Session]

6 --- Upon commencing at 12.00 p.m.

7 THE COURT USHER: All rise. Please be seated.

8 JUDGE POWER-FORDE: Good afternoon.

9 THE COURT OFFICER: The Specialist Chamber of the Constitutional
10 Court of the Kosovo Specialist Chamber, Judge Ann Power-Forde
11 presiding; and myself, Riaz Haider, Court Officer; in the matter of
12 Mahir Hasani versus the Specialist Prosecutor's Office, file number
13 KSC-CC-2019-05.

14 JUDGE POWER-FORDE: Mirëmbërëma. Dobar dan. Good afternoon.
15 Introduction.

16 This pronouncement is a summary of the ruling of the Specialist
17 Chamber of the Constitutional Court on the request of Mr. Mahir
18 Hasani (the "Applicant") for an interim measure in relation to the
19 Order of the Specialist Prosecutor's Office of 20 December 2018,
20 hereinafter (the "Order").

21 The public has been informed in advance of the date and the time
22 of the Chamber's pronouncement. The text of this pronouncement is
23 available on the website in the three official languages of the
24 Kosovo Specialist Chambers.

25 Brief Procedural Background.

1 On 15 January 2019, the Applicant lodged with the Specialist
2 Chamber of the Constitutional Court (the "Chamber") a referral, dated
3 11 January 2019. The Applicant lodged the Referral under Article
4 113(7) of the Constitution of the Republic of Kosovo (the
5 "Constitution"). The Applicant was represented by Dr. Artan Qerkini.

6 In the Referral, the Applicant complained that the Order of the
7 Specialist Prosecutor's Office directing him to provide documents and
8 information violated his right to silence and breached the privilege
9 against self-incrimination and the presumption of innocence. The
10 Applicant relied on Articles 30(6) and 31(5) of the Constitution and
11 Article 6(2) of the European Convention on Human Rights and
12 Fundamental Freedoms.

13 The Applicant has applied, pursuant to Rule 21(1) and (2) of the
14 Rules of Procedure for the Specialist Chamber of the Constitutional
15 Court, for an order in the form of an interim measure suspending the
16 Order pending a determination by the Chamber of the admissibility and
17 merits of the Referral.

18 On 15 January 2019, the President of the Specialist Chambers,
19 pursuant to Article 33(3) of the Law No. 05/L-053 on Specialist
20 Chambers and Specialist Prosecutor's Office, assigned a
21 Constitutional Panel to rule on the Referral.

22 On 25 January 2019, the Specialist Prosecutor filed his replying
23 submissions in relation to the Applicant's request for an interim
24 measure.

25 On 25 and 26 January 2019, the Constitutional Panel, composed of

1 Judges Ann Power-Forde, presiding, Judge Vidar Stensland, and Judge
2 Roland Dekkers, met to deliberate in person.

3 This pronouncement relates only to the Chamber's ruling on the
4 Applicant's request for an interim measure. The Chamber's ruling on
5 the Referral will follow in due course.

6 Brief Factual Background.

7 On 20 December 2018, the Specialist Prosecutor's Office served
8 on the Applicant two documents, namely, a summons to appear for
9 questioning on 11 February 2019 (the "Summons") and the Order to
10 provide certain documents and information to the Specialist
11 Prosecutor's Office on the same day.

12 In the Order, the Specialist Prosecutor's Office stated that the
13 Applicant was "obligated to produce" all documents, data, notes and
14 information as specified in the Order and was warned that a failure
15 to produce the documents "shall be considered contempt" which, as a
16 result thereof, the Specialist Prosecutor's Office may request the
17 Specialist Chambers to undertake measures that enforce compliance
18 with the Order.

19 The Order also stated that there were "reasons to believe that
20 the Applicant had been involved in the commission of a crime within
21 the jurisdiction of the Kosovo Specialist Chambers."

22 The Applicant has requested this Chamber to grant an interim
23 measure suspending the Order obligating him to produce the documents,
24 data, notes and information as specified in the said Order.

25 Applicable Law.

1 The Chamber recalls that, in accordance with Rule 21(1) of the
2 Rules of Procedure for the Specialist Chamber of the Constitutional
3 Court, an interim measure may be ordered where an individual faces "a
4 real risk of serious harm" if the interim measure were not granted.

5 Findings.

6 In assessing whether there is a real risk of serious harm if the
7 interim measure was not granted, the Chamber has had regard to the
8 Specialist Prosecutor's submission that the Applicant will be
9 informed of his rights to silence and to not incriminate himself on
10 11 February 2019 and the Chamber recognises that this carries some
11 weight.

12 However, the Chamber finds it difficult at this point in time to
13 reconcile that submission with the terms of the Prosecutor's Order
14 obligating the Applicant to provide the specified documents and
15 information when he appears for questioning on 11 February 2019, in
16 default of which a finding of contempt shall be made.

17 The Chamber considers that on its face the Order is problematic
18 in terms of the requirements of justice in that it constitutes an
19 order to a confirmed suspect to produce documents, data and
20 information when he appears for questioning. Such an order could, if
21 complied with, cause serious harm to the Applicant should his status
22 change from that of a suspect to that of an accused. If not complied
23 with, the Order warns that the Applicant's failure to produce the
24 documents "shall be considered contempt".

25 Under the express terms of the Order, the Applicant has no other

1 choice but to comply with its directions and to provide the requested
2 documents if he wants to avoid a finding of contempt and the
3 consequences which may follow thereafter.

4 Having regard to the foregoing and bearing in mind the time
5 constraints under which the Applicant's request for an interim
6 measure is made, the Chamber is prepared to accept that, in the very
7 specific circumstances of this case, there is a real risk of serious
8 harm in the event that the interim measure is not granted.

9 The Chamber confirms that this Order granting an interim measure
10 does no more than ensure that the status quo is maintained pending
11 its determination of the Referral.

12 The Chamber confirms that this Order is without prejudice to its
13 determination of the Referral, including to any findings it may make
14 on the admissibility or merits thereof.

15 The Chamber further confirms that this Order is without
16 prejudice to the Applicant's obligation to appear, pursuant to the
17 Summons, for questioning before the Specialist Prosecutor's Office on
18 11 February 2019.

19 Effective Date.

20 This Order on the interim measure is effective immediately.

21 The Order.

22 Having provided this summary of the Chamber's ruling, the
23 operative provisions of the Order are as follows:

24 The Specialist Chamber of the Constitutional Court, unanimously,
25 suspends the Order of the Specialist Prosecutor's Office of 20

1 December 2018 insofar as it obliges the Applicant to provide the
2 documents, data, notes and information specified in the Order until
3 such time as the Chamber decides on the Referral or until further
4 order.

5 This concludes the Chamber's pronouncement.

6 THE USHER: All rise.

7 --- Whereupon the hearing adjourned at 12.09 p.m.

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